

IN THE
Supreme Court of the United States

October Term, 1937

No. 40

EDWARD J. HARDIN, AS MAYOR OF TAEKWEIL,
TENNESSEE, ET AL. Petitioners,

vs.

KENTUCKY UTILITIES COMPANY

No. 39

POWELL VALLEY ELECTRIC COOPERATIVE

vs.

KENTUCKY UTILITIES COMPANY

No. 38

TENNESSEE VALLEY AUTHORITY, Petitioner,

vs.

KENTUCKY UTILITIES COMPANY

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

WRIT FOR HABEAS CORPUS
KENTUCKY UTILITIES COMPANY

I N D E X

	PAGE
Statute involved	1
Questions presented	2
Statement	3
Summary of Argument	14
Argument	18
I. The 1959 TVA Act confers a right or privilege on KU to be free from the competition of TVA supplied power in areas outside the TVA service area as it existed in 1957, which right is entitled to judicial protection	18
A. The purpose of the territorial limitation provisions in the 1959 TVA Act is to protect investor-owned utilities from competition by TVA and its distributors in geographic areas then served by such utilities	20
B. Given the purpose of the statute to protect KU and others similarly situated from the competition herein complained of, KU has standing to enjoin such competition	25
C. It is not a necessary condition of KU's standing to sue that the 1959 TVA Act expressly authorize civil suits	43
II. The Court of Appeals correctly construed the provisions of the 1959 TVA Act as prohibiting TVA electric service in an area of Claiborne County, Tennessee, served exclusively by KU on July 1, 1957	47
A. The history and meaning of the Act	48
1. The area for which TVA or its distributors were the primary source of power supply	52

2. The exception for the five-mile growth area	59
3. The exception for unserved areas within the area in which TVA had generally established electric service	60
4. The exception as to specifically named cities and customers	64
B. The subsequent legislative history	67
C. The basis for the Court of Appeals determination on the merits	70
D. The basis of the TVA Board's determination	73
III. In rejecting the determination of the TVA Board in this action the Court of Appeals properly exercised its function of judicial review ..	82
Conclusion	92
Appendix	1a

CITATIONS

Cases:

<i>Alabama Power Co. v. Ickes</i> , 302 U. S. 464	28, 29, 36
<i>Alton R. R. v. United States</i> , 315 U. S. 15	27
<i>American Trucking Ass'ns v. United States</i> , 364 U. S. 1	27
<i>Baltimore & Ohio R. R. v. United States</i> , 264 U. S. 258	27
<i>Berry v. Housing & Home Finance Agency</i> , 340 F. 2d 939 (2nd Cir.)	34, 42
<i>Brownell v. Tom We Shung</i> , 352 U. S. 180	44, 45
<i>Burlington Truck Lines v. United States</i> , 371 U. S. 156	90

<i>Chicago v. Atchison, T. & S. F. Ry.</i> , 357 U. S. 77	28
<i>Chicago Junction Case</i> , 264 U. S. 258	27, 42
<i>Commercial Security Bank v. Saxón</i> , 236 F. Supp. 457 (D. D. C.), aff'd, 385 U. S. 252	33, 37
<i>Commercial State Bank v. Gidney</i> , 174 F. Supp. 770 (D. D. C.), aff'd, 278 F. 2d 871 (D. C. Cir.)	33
<i>Consolo v. Federal Maritime Comm'n</i> , 383 U. S. 607	82
<i>Corn Products Refining Co. v. FTC</i> , 324 U. S. 726	82
<i>Davies Warehouse Co. v. Bowles</i> , 321 U. S. 144	84
<i>FTC v. Borden Co.</i> , 383 U. S. 637	87
<i>FTC v. Brown Shoe Co.</i> , 384 U. S. 316	87
<i>Fishgold v. Sullivan Dry Dock & Repair Corp.</i> , 328 U. S. 275	86
<i>Freeman v. Brown</i> , 342 F. 2d 205 (5th Cir.)	45
<i>Frost v. Corporation Comm'n</i> , 278 U. S. 515	27, 36
<i>Georgia Power Co. v. TVA</i> , Civil No. 1788 (N. D. Ga.)	43
<i>Gray v. Powell</i> , 314 U. S. 402	84, 86
<i>Harmon v. Brucker</i> , 355 U. S. 579	44
<i>Harrison-Halsted Community Group, Inc. v. Hous- ing & Home Finance Agency</i> , 310 F. 2d 99 (7th Cir.), cert. denied, 373 U. S. 914	34
<i>Illinois Central R. R. v. Norfolk & Western Ry.</i> , 385 U. S. 57	82
<i>ICC v. J-T Transport Co.</i> , 368 U. S. 81	84
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U. S. 123	25
<i>Kansas City Power & Light Co. v. McKay</i> , 225 F. 2d 924 (D. C. Cir.), cert. denied, 350 U. S. 884	33, 36
<i>Kentucky Utilities Co. v. TVA</i> , Civil No. 4385 (W. D. Ky.)	43

<i>Leedom v. Kyne</i> , 358 U. S. 184	44, 91
<i>Massachusetts v. Mellon</i> , 262 U. S. 447	31
<i>Missouri Power & Light Co. v. Lewis County R. E. C. Ass'n</i> , 235 Mo. App. 1056, 149 S. W. 2d 881	39
<i>National Bank of Detroit v. Wayne Oakland Bank</i> , 252 F. 2d 537 (6th Cir.), cert. denied, 358 U. S. 830	33, 34
<i>NLRB v. Brown</i> , 380 U. S. 278	83
<i>NLRB v. Coca-Cola Bottling Co.</i> , 350 U. S. 264	84
<i>NLRB v. Hearst Publications</i> , 322 U. S. 111	83, 84, 90
<i>NLRB v. Highland Park Mfg. Co.</i> , 341 U. S. 322	83
<i>Pennsylvania R. R. v. Dillon</i> , 335 F. 2d 292 (D. C. Cir.), cert. denied sub nom. <i>American Hawaiian S. S. Co. v. Dillon</i> , 379 U. S. 945	34, 42
<i>Perkins v. Lukens Steel Co.</i> , 310 U. S. 113	32
<i>Peters v. Hobby</i> , 349 U. S. 331	91
<i>Pittsburgh Hotels Ass'n, Inc. v. Urban Redevelopment Authority</i> , 309 F. 2d 186 (3rd Cir.), cert. denied sub nom. <i>Hilton Hotels Corp. v. Urban Redevelopment Authority</i> , 372 U. S. 916	34
<i>Railroad Co. v. Ellerman</i> , 105 U. S. 166	29, 31
<i>Roberts v. United States ex rel. Valentine</i> , 176 U. S. 221	88
<i>REA v. Central Louisiana Electric Co.</i> , 354 F. 2d 859 (5th Cir.), cert. denied, 385 U. S. 815	33
<i>REA v. Northern States Power Co.</i> , 373 F. 2d 686, cert. denied, 387 U. S. 945	33, 39
<i>Schaffer Transportation Co. v. United States</i> , 355 U. S. 83	84
<i>SEC v. Chenery Corp.</i> , 332 U. S. 194	90
<i>SEC v. New England Electric System</i> , 384 U. S. 176	87
<i>Shaughnessy v. Pedreiro</i> , 349 U. S. 48	45

<i>Social Security Board v. Nierotko</i> , 327 U. S. 358	92
<i>Stark v. Wickard</i> , 321 U. S. 288	44
<i>Taft Hotel Corp. v. Housing & Home Finance Agency</i> , 262 F. 2d 307 (2nd Cir.), cert. denied, 359 U. S. 967	34
<i>Tennessee Electric Power Co. v. TVA</i> , 306 U. S. 118	29, 32
<i>Texas & Pacific Ry. v. Gulf C. & S. F. Ry.</i> , 270 U. S. 266	27
<i>Texas & Pacific Ry. v. Rigsby</i> , 241 U. S. 33	44
<i>Unemployment Compensation Comm'n v. Aragon</i> , 329 U. S. 143	84
<i>United States v. Drum</i> , 368 U. S. 370	84
<i>United States v. Utah Construction & Mining Co.</i> , 384 U. S. 394	82
<i>Universal Camera Corp. v. NLRB</i> , 340 U. S. 474	83
<i>Whitney Nat'l Bank v. Bank of New Orleans</i> , 323 F. 2d 290 (D. C. Cir.), reversed, 379 U. S. 411	35

Statutes:

Administrative Procedure Act, 5 USC § 1009	45, 82
Emergency Relief Appropriations Act of 1935, 49 Stat. 115, 119	30
Federal Trade Commission Act, 15 USC § 45(a)	87
Mich. Stat. Ann. § 23.762	34
National Bank Act, 12 USC § 36c	34
National Labor Relations Act, 29 USC § 159(b)	92
Public Utility Holding Company Act of 1935, 15 USC § 79k(b)(1)(A)	87
Robinson Patman Act, 15 USC § 13(c)	87
Rural Electrification Act of 1936, 7 USC § 901-04	38
Tennessee Valley Authority Act Section 11, 16 USC § 831j (48 Stat. 64)	87

Section 15d, 16 USC § 831n-4(a) (73 Stat. 280)	1,
3a, <i>passim</i>	
Section 15d, 16 USC § 831n-4, as amended (Pub. L. 89-537, 80 Stat. 346)	67
Transportation Act of 1920, 49 USC § 5(2)	26
Walsh Healy Act, 41 USC § 35	32
<i>Miscellaneous:</i>	
103 Cong. Rec. 142205 (Aug. 9, 1957)	59
105 Cong. Rec. 7703 (May 7, 1959)	63
105 Cong. Rec. 13047 et seq. (July 9, 1959)	24, 58, 66
105 Cong. Rec. 14111 et seq. (July 23, 1959)	41, 47, 55, 62
112 Cong. Rec. 16477-82 (Daily ed. July 27, 1966)	67- 69
Hearings before Subcommittee on Flood Control of House Committee on Public Works, 85th Cong., 1st Sess., TVA Financing (No. 85-5, H. R. 3236 & 4266)	53
Hearings before House Committee on Public Works, 86th Cong., 1st Sess., March 10-11, 1959 (No. 86-3, H. R. 3460)	21, 48, <i>passim</i>
Hearings before Subcommittee of Senate Commit- tee on Public Works, 86th Cong., 1st Sess., June 9-10, 1959 (H. R. 3460 & S 931)	81
Jaffe, Judicial Control of Administrative Action (1965)	42
S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2000 (1959)	22, 46, <i>passim</i>
S. Rep. No. 1399, 89th Cong., 2nd Sess. (July 22, 1966), 2 U. S. Code Cong. & Ad. News, 89th Cong., 2nd Sess., p. 2626 (1966)	68

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 40, 50 and 51

EDWARD J. HARDIN, as Mayor of Tazewell,
Tennessee, et al.,

Petitioners,

v.

KENTUCKY UTILITIES COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR RESPONDENT,
KENTUCKY UTILITIES COMPANY**

This Brief is filed on behalf of the respondent, Kentucky Utilities Company (hereafter called "KU"), in response to Briefs previously filed in the above styled consolidated actions by the petitioners, Edward J. Hardin and James B. DeBusk, as Mayors of Tazewell and New Tazewell, Tennessee, respectively (hereafter called "the Cities"), Powell Valley Electric Cooperative (hereafter called "Powell Valley") and the Tennessee Valley Authority (hereafter called "TVA").

The Statute Involved

The pertinent provisions of Section 15d(a) of the Tennessee Valley Authority Act, 16 USC ¶ 831n-4(a) are set forth in petitioners' Briefs and reprinted in the appendix to this Brief (*infra* p. 3a). The statute will hereafter be referred to as the "1959 TVA Act".

The Questions Presented

The 1959 TVA Act expressly prohibits TVA from entering into contracts which would have the effect of making TVA or TVA distributors a source of power supply outside the area for which TVA and its distributors were the primary source of power supply on July 1, 1957. In 1963, a TVA distributor, Powell Valley, pursuant to arrangements with TVA, began supplying electric power to customers in the Cities of Tazewell and New Tazewell, Tennessee, which customers (1) had been previously served by KU, and (2) were located in a part of a geographically contiguous area comprising a small part of northeastern Tennessee and a large part of Kentucky, which area was served by KU and not served by TVA or its distributors on July 1, 1957, and at all times prior and subsequent thereto up to 1963. The questions presented are:

(1) Whether an investor-owned utility has standing to maintain an action to enjoin TVA from supplying power to customers and areas now served by such utility, on the ground that the supply of such power would be in contravention of the provisions of the 1959 TVA Act.

(2) Whether the Court of Appeals, based on the undisputed facts of this case, correctly construed the provisions of the 1959 TVA Act as prohibiting TVA service in the area of the Cities in question served by KU on July 1, 1957.

(3) Whether the Court of Appeals exceeded the permissible scope of judicial review in reaching a conclusion

of law as to the proper interpretation of the 1959 TVA Act, which interpretation was contrary to the interpretation of the TVA Board of Directors in this action.

Statement

In seeking to overturn the decision of the Court of Appeals in this case, the Petitioners place primary reliance on two jurisdictional or procedural arguments: (1) that KU has no standing under the TVA Act to challenge violations of the Act; and (2) that the Court of Appeals exceeded the permissible scope of judicial review in reaching a conclusion as to the proper interpretation of the Act contrary to the interpretation of the TVA Board of Directors and the District Court. Due perhaps to the emphasis on the jurisdictional and procedural questions, the Briefs of the petitioners contain a very limited and selective exposition of the facts of the case. The basic operative facts underlying this action are not and have never been in dispute among the parties, and it is against this factual background that the question of whether the Court of Appeals correctly interpreted and applied the statute must be determined. The following is a brief summary of the undisputed facts of the case which were available to the TVA Board when it made its determination as to the meaning of the Act and its application to the facts of this case.

KU is an investor-owned public utility which renders retail and wholesale electric service in a large part of the State of Kentucky from the Mississippi River eastward to the eastern border of Kentucky and extending into a part of northeastern Tennessee adjacent to Kentucky. The

entire southern boundary of the KU service area is contiguous to the area served by TVA and its distributors. The area in question in this case is that small area of northeastern Tennessee immediately adjacent to and southeast of the point where Kentucky, Virginia and Tennessee come together.

From 1920 to the present day KU and its predecessor corporation, Dixie Power and Light Company, have been the sole supplier of electric energy in that area of Claiborne County, Tennessee, extending from the Kentucky, Tennessee border at Cumberland Gap, Tennessee, south and east in a corridor approximately 15 miles long, which corridor includes all but a small part of the Cities of Tazewell and New Tazewell, Tennessee.¹ KU is the owner of a perpetual franchise, granted to Dixie Power and Light Company in 1926, to construct and maintain its power lines along any of the public ways of Claiborne County, including the public ways in the Cities of Tazewell and New Tazewell, which were incorporated in 1954. In 1954 Dixie Power and Light Company was dissolved and all of its property, including this franchise, was transferred to KU and the acquisition of the franchise was expressly approved by the Railroad and Public Utilities Commission of Tennessee. In 1952, KU also obtained and now owns another franchise granting it the right to maintain transmission and distribution lines along the county highways between Cumberland Gap and New Tazewell in Claiborne County.²

¹ R. 328.

² R. 329-332, 411.

Pursuant to these franchises, KU, or its predecessor corporation, has for many years prior and subsequent to the enactment of the 1959 TVA Act maintained extensive transmission facilities and a distribution network serving an unbroken line of customers down the highway from the Kentucky border at Cumberland Gap, Tennessee, to and including the Tazewells and on beyond into the area south of New Tazewell.³ Other parts of Claiborne County, Tennessee, were, on July 1, 1957, and are now, being supplied with electric service by two distributors of TVA power, the petitioner, Powell Valley, and the City of LaFollette, Tennessee, municipal electric system.

The location of all of the customers and electric lines of the two TVA distributors in Claiborne County, Powell Valley and the City of LaFollette, are shown on the map of Claiborne County filed as Exhibit 38.⁴ This map was prepared by Powell Valley and TVA. Superimposed on this map are the primary distribution lines of KU in Claiborne County, shown by red dotted lines, and also the KU transmission lines, shown with a heavy red line. As acknowledged by Powell Valley's manager, it would be impossible to show all of the customers and secondary distribution lines of KU on a map of this scale due to their density.⁵ While the map is, therefore, not an accurate comparison of the facilities of the TVA distributors on the one hand and KU on the other, it does show the general area served by the TVA distributors and the area or corridor of KU service extending from Cumberland Gap,

³ R. 328-329, 407-410; Ex. 37-R. 408, 772.

⁴ Ex. 38-R. 410, 773.

⁵ Ex. 83-R. 537, 793.

Tennessee, down the highway to the Tazewells and on south of New Tazewell.

As stipulated by the parties, on July 1, 1957, the key date in the 1959 TVA Act, KU served 344 customers in Tazewell and Powell Valley served 20 customers. In New Tazewell, KU served 217 customers and Powell Valley served 8. Thus, in the two towns combined, KU served a total of 561 customers to Powell Valley's 28, or 95.3% of the customers and 94.1% of the energy delivered.⁶ As shown on Exhibit 25,⁷ a map prepared by petitioners, of the 28 customers in the Cities served by Powell Valley on July 1, 1957, one customer was in the extreme southwestern portion of the City and the other 27 customers are spread out along the southeastern edge of the Cities. These customers were located at the ends of rural lines and the lines had either been extended into the city limits or the city limits had been expanded to include the last few customers on these rural lines.⁸ On the other hand, as shown on Exhibit 23,⁹ KU's facilities blanketed the entire town and every residence or place of business in each town could be served by the KU facilities.

Outside the two towns in the area extending from the Tazewells north and west to the Kentucky-Tennessee border at Cumberland Gap, Tennessee, KU maintained a transmission line and extensive distribution facilities serving continuous unbroken line of customers between the Tazewells and the Kentucky border and in this 14 to 15

⁶ R. 84, 380-384.

⁷ Ex. 25-R. 386, 758.

⁸ R. 388.

⁹ Ex. 23-R. 384, 757.

mile corridor served over 1,200 customers. These customers are located in and around the communities of Cumberland Gap, Harrogate, Shawanee, Tiprell, Arthur and up and down the highway between Cumberland Gap and Tazewell.¹⁰

As of July 1, 1957, the two TVA distributors in Claiborne County, Powell Valley and the City of LaFollette, taken together, served a total of 3,564 customers in the County and on the same date KU served 1,839 customers. During the months of June and July, 1957, Powell Valley and LaFollette, taken together, supplied an average of 1,015,000 kwh of electric energy per month within Claiborne County and KU supplied an average of 610,000 kwh per month. Thus, KU served 33.8% of the customers and supplied 37.5% of the energy being supplied in the County, and as between KU and Powell Valley, KU supplied more energy in the County than Powell Valley on July 1, 1957.¹¹ KU has no dispute with the City of LaFollette as to their respective service areas in the County.

The undisputed facts of this case further demonstrate that both TVA and Powell Valley have consistently recognized, from a time long before July 1, 1957, up to the institution of this litigation in 1963, that KU was the exclusive supplier of electric service in the area of Claiborne County in question, that is, the area extending from the Kentucky-Tennessee border south and east in a corridor approximately 15 miles long, to and including most of the Cities of Tazewell and New Tazewell.

In 1952, KU, TVA and Powell Valley entered into an agreement relative to the supply of electric energy in Clai-

¹⁰ R. 407-410, 445.

¹¹ R. 84, 441-442.

borne County, including the two Tazewells and surrounding areas. As a part of this tripartite agreement, KU and Powell Valley entered into a letter agreement dated August 22, 1952, pursuant to which each of these utilities agreed that it would not "serve any customer who is receiving service from the other party."¹² In January, 1958, KU and Powell Valley entered into a second, more detailed, territorial agreement which provided among other things, that any new loads would be served by the utility whose facilities taking into consideration territorial boundaries either fixed or following from logical considerations, were closest to the load.¹³

In connection with the 1952 agreement between TVA, KU and Powell Valley, TVA furnished to KU a map prepared by TVA for the express purpose of "showing the areas now served by LaFollette Electric Department, the Powell Valley Electric Cooperative, and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee."¹⁴ In 1960, after the passage of the 1959 TVA Act, KU's division manager and the manager of Powell Valley decided that it would be helpful in implementing the 1958 territorial agreement if a map were prepared to define the respective service areas of KU and Powell Valley in Claiborne County. Accordingly, in early 1960 Powell Valley and KU each designated a representative to work together in the preparation of such a map. The two representatives worked together in the field and prepared a precise and detailed map clearly defining at all points the boundary between the respective service areas of KU and

¹² R. 332-333, 360.

¹³ R. 335-338, 361-362.

¹⁴ Ex. 36-R. 402, 769; R. 400.

Powell Valley.¹⁵ Based on their field work the boundary line was superimposed on a United States Geological Survey map of the area.¹⁶ Supplementing this basic map were four large scale maps showing the service area boundaries within Tazewell and New Tazewell.¹⁷ The two managers of the utilities then reviewed and agreed upon the map as defining the respective service areas and the map was thereafter used by both managers for the resolution of questions as to the service area and service to individual customers.¹⁸

In addition to the above maps, one made by TVA and the other by KU and Powell Valley jointly, for the express purpose of defining the boundaries of KU's service area in Claiborne County, there are 10 other maps in evidence in this case made and published by TVA from the years 1956 through 1963 which show that there was a corridor of KU electric service in Claiborne County extending without interruption from the Kentucky-Tennessee border to and including Tazewell.¹⁹

Thus, the stipulated or undisputed facts of this case show that there was, on July 1, 1957, and is today, an area

¹⁵ R. 363-364. The two representatives who prepared the maps were Harry Rowe of Powell Valley and John Osborne of KU, both of whom testified in this case as to the preparation of the map (see R. 370-378). The map was referred to throughout the case and will be referred to herein as the "Rowe-Osborne map."

¹⁶ Ex. 14-R. 366, 807-808. The top half of the map is also found at R. 973 and the bottom half at Exhibit Volume 1, sheet 4b.

¹⁷ Ex. 15 through 18-R. 366, 753-756.

¹⁸ R. 364-365.

¹⁹ Ex. 26-R. 395, 759 (This exhibit and Exhibit 33 are reproduced in color, similar exhibits 27 through 32, 34 and 35 are reproduced in black and white only). Ex. 27 through 34-R. 395, 760-767; Ex. 35-R. 399, 768.

of Claiborne County, Tennessee, extending without interruption from the Kentucky-Tennessee border to and including most of the Cities of Tazewell and New Tazewell which was and is served exclusively by KU and that this area of KU service is contiguous to the remainder of the KU service area in Bell County and elsewhere in Kentucky; and it is further undisputed that both TVA and Powell Valley have consistently recognized, both before and after the 1959 TVA Act, the existence of this area of KU service.

It is against this factual background, which will be more fully developed in subsequent portions of this Brief, that the Court of Appeals was required to test the validity of the determination of the TVA Board of Directors that the whole of Claiborne County, Tennessee, was within the area for which TVA was the primary source of power supply.

The events immediately leading to this litigation may be summarized briefly as follows. On February 4, 1960, representatives from Middlesboro, Kentucky, and a representative from Tazewell, Tennessee, met with the TVA Board of Directors for the purpose of obtaining a TVA power contract for Middlesboro. TVA officials advised these representatives that the 1959 TVA Act prevented TVA service to Middlesboro, Kentucky, but that it would be legally possible for TVA to serve Tazewell, Tennessee, and it was suggested that Tazewell might make arrangements with Powell Valley for TVA service.²⁰ The following year TVA officials concluded that the 1959 TVA Act would preclude TVA from rendering service in the Cumberland Gap area of Claiborne County served by KU, and

²⁰ Ex. 98-R. 578, 811.

expressed serious doubts about the legality of TVA service in the Tazewells, suggesting that a court decision might be helpful.²¹

Subsequently a number of meetings were held and correspondence exchanged among TVA, Powell Valley and representatives of the Cities of Tazewell and New Tazewell for the purpose of arranging for TVA service for the Cities.²² On October 16, 1962, Powell Valley purported to terminate the 1958 territorial agreement with KU and subsequently the Cities offered to purchase KU's distribution system, which offer was refused by KU.²³ Thereafter, in response to specific requests from the Mayors of the two Cities, TVA, by letter dated September 23, 1963, advised the manager of Powell Valley that TVA would supply Powell Valley with the necessary power requirements to serve the Cities of Tazewell and New Tazewell.²⁴

On October 30, 1963, contractors employed by the Cities, or Powell Valley, began removing KU's meters from the meter sockets on its customers' buildings and inserting meters of Powell Valley, to connect KU customers to the electric distribution system of Powell Valley. During the succeeding several weeks some 20 customers of KU in Tazewell and New Tazewell were taken over by Powell Valley in this manner.²⁵ KU, accordingly, filed its Com-

²¹ Ex. 70-R. 215, 853-854.

²² At one of these meetings between representatives of Powell Valley and TVA, at which no representatives of the Cities were present, methods were discussed of "putting pressure" on KU, such as approaching the Tennessee Utilities Commission to order KU out of the towns. Ex. 62-R. 110, 956; Ex. 74-R. 238, 908.

²³ R. 338-340.

²⁴ Ex. 82-R. 265, 934.

²⁵ R. 425-436, 467-475.

plaint in this action on November 7, 1963, to prevent the further taking of its customers and business and to recover those customers taken by the defendants on or after October 30, 1963.

On August 26, 1964, some 8½ months after the beginning of this litigation and about 3 weeks before the trial of the action in the District Court, TVA's Board of Directors adopted a resolution purporting to "find and determine" that all of Claiborne County, Tennessee, was within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and further "finding" that the "periphery" of the TVA service area in Claiborne County, Tennessee, was the Kentucky-Tennessee border.²⁶ During discovery proceedings in this action, and prior to the adoption by the TVA Board of the above resolution, it developed that TVA had in fact made no attempt to determine the exact location of the perimeter of its service area in Claiborne County and the Board resolution was obviously prompted by that fact.²⁷

²⁶ Ex. 93-R. 553, 796.

²⁷ In the deposition of Mr. G. O. Wessenauer, TVA's manager of power, taken on August 12, 1964, two weeks before the adoption of the Board resolution, the following questions and answers were made:

"Q. Now, Mr. Wessenauer, a question has arisen in this case with respect to Claiborne County, and I would like to ask you how you would draw a line across that county depicting where the boundary of TVA service should stop under the terms of the Act?

A. I don't know the answer to that.

Q. Has any officer or representative of TVA given you any advice about that?

A. About what?

Q. About the drawing of the line, where it—what factors would govern the drawing of the line?

A. Well, I think the factors that would govern that would be provided for in the Act.

After trial of the action, the District Court entered a judgment dismissing the Complaint. After holding that KU had standing to maintain the action and that the determination of the TVA Board of Directors was subject to judicial review, the Court concluded on the merits that:

"The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act *intended* to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957." (237 F. Supp. at p. 514.)²⁸

On appeal, the Court of Appeals reversed the judgment of the District Court, one judge dissenting. The Court of Appeals upheld the District Court's decision that KU had standing to sue and held that "the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this Appeal." (375 F. 2d at p. 415.) On the merits, the Court of Appeals, after a summary of the undisputed facts and a review of the meaning and purpose of the 1959 TVA Act as disclosed in

Q. And where would you draw it then, this Claiborne County, specifically?

A. I don't know; I haven't looked at it.

Q. Who would have the function in TVA of drawing that line?

A. Well, it would—if a line has to be drawn, it would be after an examination of all of the facts and I presume that we would get the advice of our Legal Department as to the meaning of the law with respect to any particular situation, and in light of that advice and the facts that we would have, we would ascertain where the line would be." (R. 296)

²⁸ Emphasis, unless otherwise noted, is added.

the Act itself and its legislative history, held that the area in question was outside the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA and its distributors were, therefore, forbidden by statute from making contracts for the sale or delivery of power in that area. Judge Edwards, dissenting, agreed with the Court that the TVA Act conferred standing on KU to bring the action, but concurred with the District Court on the merits.

Summary of Argument

With respect to the question of the standing to maintain this action, the position of KU rests not on any general right to be free from competition of the Federal power programs but a specific right created by statute to be free from the very competition by TVA herein complained of. The statutory prohibition against the geographic expansion of TVA electric service was enacted for the special purpose of protecting KU and those other electric utilities operating in areas adjacent to the TVA service area from competition by TVA and its distributors. KU is not complaining of lawful competition made possible by the unlawful act of others, as to which it has no special interest, but competition declared to be unlawful by a statute enacted for the very purpose of protecting KU and others similarly situated from such competition. The protection of KU's competitive position vis a vis TVA and its distributors is a right or privilege created by statute for its benefit, and under such circumstances this Court has historically held that a right of action under the statute will be implied.

In the introduction to the argument section of the Brief for the petitioner, TVA, there is set forth TVA's interpretation of the 1959 TVA Act. Since this interpretation is at odds with the Congressional intent, as shown by the legislative history of the Act, and contrary to the interpretation of the Act made by the Court of Appeals, we will first briefly discuss the several provisions which restrict the geographic area of permitted TVA service.

The 1959 TVA Act contains one basic limitation on the area in which TVA can supply power, followed by several carefully circumscribed exceptions to this basic limitation. TVA service is basically limited to the geographic area for which TVA or its distributors were the primary source of power supply on July 1, 1957. This area includes and is limited to the geographic area where the customers and lines of TVA and its distributors were physically located on the key date. The term "primary" source of power supply, as opposed to "sole" source, was used not for the purpose of permitting TVA to expand its service area beyond the geographic limits of its distribution lines and customers but to take care of those situations where customers and lines of the TVA distributors might be so interlaced with the customers and lines of neighboring utilities that no exact border could be established. In such cases TVA distributors could extend service to the edge of the area where their customers were

²⁹ Such is not the case here as a definite boundary exists between the KU service area and that of Powell Valley and was depicted on the detailed Rowe-Osborne map, prepared by KU and Powell Valley jointly, after the Act was passed and before this controversy arose. located.²⁹

To this basic limitation there are four exceptions: (1) TVA service may be extended to such additional area not more than 5 miles around the periphery of the existing service area as may be necessary to care for the growth of TVA and its distributors within the TVA service area, *except* that such 5-mile growth area is subject, among others, to the condition that no part of such additional area may be in a municipality receiving electric service from another source on or after July 1, 1957 (e.g., Tazewell and New Tazewell); (2) TVA or its distributors may serve customers in areas in which TVA had "generally established electric service on July 1, 1957," provided that such areas were not receiving electric service from another source on the effective date of the Act, August 6, 1959. From the legislative history it is clear that this provision was intended to cover isolated areas, or "islands" wholly surrounded by the service area of TVA, and not receiving electric service from any source on the date of the Act; (3) TVA may serve certain specifically named cities and customers which are expressly excepted from the prohibitions of the Act, which cities include some at a considerable distance from the existing TVA service area and some cities which were completely surrounded by the TVA service area; (4) TVA may make exchange power arrangements with other utilities with which it had such arrangements on July 1, 1957.

The petitioners do not contend that any of the above exceptions in the Act apply to this case. Their sole contention is that the part of Claiborne County, Tennessee, served exclusively by KU is somehow inside or a part of the area for which TVA was the primary source of power supply. On the merits there is no factual or legal dis-

inction between the area of Claiborne County, Tennessee, served by KU and any other part of the KU service area along the 300 mile boundary between the KU and TVA service areas. Such an arbitrary extension of the TVA boundary renders the 5-mile exception nugatory. If TVA service is permitted to replace KU service in Tazewell and New Tazewell, even though these Cities were not excepted from the provisions of the Act, the specific exception for other cities, some of which were wholly surrounded by the TVA service area, is likewise rendered meaningless.

The only reasons advanced by petitioners for placing the boundary of the TVA area through the middle of an area served exclusively by KU are (1) TVA distributors served most of Claiborne County, and (2) TVA exhibited certain large scale maps to Congressional committees, which were admittedly rough approximations, showing all of Claiborne County as within the TVA area. With respect to the first of these contentions Congress considered and rejected a Bill which would have permitted TVA service in the whole of any county partly served by TVA, in favor of legislation restricting TVA to the area actually served by it. As for the second contention, it certainly cannot be implied that Congress intended to define the TVA area as an area shown on inaccurate maps exhibited at committee hearings. The Court of Appeals properly rejected these arguments and based its determination on the only valid consideration, the undisputed facts as to the geographic area where TVA power was actually being distributed in 1957.

Finally, we turn to the question of whether the Court of Appeals, in rejecting the interpretation placed upon

the Act by TVA, exceeded the permissible scope of judicial review. It is well settled under the decisions of this Court that the determination of whether an administrative agency has exceeded its statutory authority is a proper judicial function, and particularly is this true in those cases where an express statutory limitation on agency powers is involved. The statute in question contains precise standards limiting the permissible area of TVA service and the TVA Board simply ignored plain limitations on its authority.

The petitioners contend the determination of the TVA Board was entitled to deference by the Court of Appeals and could be overturned only if unreasonable. Even if this were considered to be the proper rule respecting the scope of judicial review of this type of agency action, the Court of Appeals gave ample deference to the conclusions of the TVA Board, and properly found them to be unreasonable.

ARGUMENT

I.

The 1959 TVA Act confers a right or privilege on KU to be free from the competition of TVA supplied power in areas outside the TVA service area as it existed in 1957, which right is entitled to judicial protection.

In its Complaint in this action, KU alleges that TVA and the other defendants have appropriated, and unless enjoined will continue to appropriate to themselves the electric utility business and customers of KU within Tazewell and New Tazewell, in violation of the provisions of the 1959 TVA Act expressly prohibiting the rendering of electric service by TVA or its distributors in such areas. The petitioners contend that KU has no standing to maintain this action against them.

The petitioners' contentions in this respect may be summarized as follows: (a) As KU does not have an exclusive franchise to supply electric service to the Cities of Tazewell and New Tazewell it is not entitled to be free from the competition of TVA and its distributors in that area, and the damage to KU from such competition is, therefore, *damnum absque injuria*; and (b) The 1959 TVA Act does not expressly provide for the institution of civil actions based upon violations of the Act and, absent such express provisions, no right of action will be implied.

KU admittedly does not have an exclusive franchise for the sale of electricity in the area served by it in Claiborne County and is not claiming a right to be free from any competition in the area, nor is it seeking generally to enjoin or restrain the execution of Federal power programs. On the other hand, KU does have a valid franchise to engage in the electric utility business in all parts of Claiborne County, including Tazewell and New Tazewell, and presently serves approximately 2,000 customers in the county and derives annual revenues of approximately \$178,000 from its operations in Tazewell and New Tazewell alone.³⁰

Being lawfully engaged in the sale of electric power in Claiborne County, KU does have a right under the 1959 TVA Act to enjoin the defendants from engaging in competition with KU, which competition is specifically declared to be unlawful under statutory provisions enacted for the purpose of protecting KU and others similarly situated from this type of competition. Although the 1959 TVA Act contains no express provisions concerning civil suits, the authorities discussed below demonstrate that

³⁰ R. 328.

such express provisions are not a necessary condition to the bringing of an action to protect rights granted by Federal statute.

- A. The purpose of the territorial limitation provisions in the 1959 TVA Act is to protect investor-owned utilities from competition by TVA and its distributors in geographic areas then served by such utilities.**

It cannot seriously be questioned, and indeed petitioners do not question, that the intent and purpose of Congress, in enacting the territorial limitation provisions of the 1959 TVA Act, was to protect the business of investor-owned utilities operating in the areas adjacent to the TVA service area from competition by TVA and its distributors. During the four-year course of the passage of this legislation through Congress the provisions were amended from time to time to meet specific objections raised by representatives of the utilities at the several hearings. Proponents of the provisions in both Houses of Congress, including the authors of both the House and the Senate versions, specifically stated that their intent was to protect investor-owned utilities from competition by TVA, and all of the hearings and debates on the territorial limitation provisions centered upon the protection of investor-owned utilities.

The legislative history is replete with statements concerning the intent of Congress to protect utilities and only a few examples will be noted here.

In the course of the hearings before the House Committee on Public Works, Representative Vinson, testifying

in favor of his amendment to the area limitation provisions, stated:

"I appear this morning in support of an amendment to this bill which [sic] permit TVA to supply adequate power needs in its present area; will adequately protect the Federal Government; will adequately protect purchasers of TVA power and investors in TVA bonds; and *will also protect the municipalities of Georgia, the taxpayers of Georgia, the stockholders of the Georgia Power Co., the employees of the Georgia Power Co., as well as thousands upon thousands of individuals who have investments in private utility companies.*"³¹

In conclusion, Representative Vinson stated:

"I offer no apology for appearing here today on behalf of the municipalities of Georgia, as well as the Georgia Power Co. The Georgia Power Co. is a private utility system owned by private citizens. It has 8,910 stockholders, 6,600 of whom are citizens of Georgia.

*"My amendment very clearly protects my constituents who are stockholders in the Georgia Power Co., and most importantly, the municipalities of my district who do business with the Georgia Power Co."*³²

Representative Boykin, testifying at this hearing in favor of the Vinson amendment, stated:

"I am speaking for our entire Alabama delegation that has the service of the Alabama Power Co. in their mind. . . . I don't want any public business to put any private business out of business."³³

³¹ Hearings before House Committee on Public Works, March 10-11, 1959, 86th Cong., 1st Sess., p. 110 (No. 86-3, H.R. 3460).

³² Id at p. 115.

³³ Id at p. 122.

In addition to the several Congressmen who testified at the hearings in favor of the Vinson amendment, officers of the investor-owned utilities most immediately affected by the threat of TVA expansion also testified at length. With reference to the testimony of one of these officers, Harllee Branch, Jr., President of the Southern Company, Representative Wright stated:

"I think I can say to the gentleman, without fear of contradiction, that most of the members of this committee want to be fair and reasonable in this matter and to protect the legitimate interests, both of such private utility companies, as our witness represents, and of the TVA."³⁴

In the Report of the Senate Committee on Public Works it is stated:

"In summation, the committee believes that H.R. 3460, as amended, is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; . . . protect the areas now being served by private utilities; . . ."³⁵

Senator Randolph in his Supplemental Views to the Senate Committee Report, stated:

"It would be inadvisable to permit excessive competition by TVA to encroach on the areas served by these and other investor-owned public utilities; to si-

³⁴ Id at p. 129-30.

³⁵ S. Rep. No. 470, 86th Cong., 1st Sess., p. 9 (July 2, 1959); 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2008 (1959).

*phon off their customers and to destroy the value of their properties.'*³⁶

In the course of the Senate debate on H.R. 3460 Senator Cooper voiced his objections to the Randolph amendment as too restrictive of the expansion of TVA but stated that he would nevertheless vote for passage of the bill "because I have sponsored self-financing from the outset. I respect the service of private utilities in my own State."³⁷ Senator Holland, speaking in support of the area limitation, noted that the unlimited expansion of TVA would result in "jeopardy" to the investors in "private power facilities."³⁸ Senator Kerr, Chairman of the subcommittee which considered the bill, speaking in favor of the Randolph amendment, stated:

"[T]he Tennessee Valley Authority needs this bill, and the utilities in the surrounding areas are entitled to have their status settled, as is the Tennessee Valley Authority."³⁹

Senator Randolph made extensive remarks in support of his amendment, some of which were as follows:

"But it is a duty of Congress to see that the creation of TVA to provide a yardstick to measure the equity and efficiency of private utility rates not result in the fashioning of a walking stick which TVA could use to encroach upon and destroy investor-owned elec-

³⁶ Id at p. 55.

³⁷ 105 Cong. Rec., p. 13053 (July 9, 1959).

³⁸ Id at p. 13054.

³⁹ Id. at p. 13055.

tric energy companies, their fuel suppliers, and the jobs of many individuals.

“As TVA expands and takes over investor-owned company customers, it impairs the values of private enterprise properties and makes financing difficult.

“[A]s I pointed out in my supplemental views on H.R. 3460 as published in connection with the committee report on this measure, I am aware that there seems to persist the question of whether or not the language of the House bill, or the provisions of the amendments recommended by the Senate Committee on Public Works, would be the most effective in accomplishing these objectives:

“First. Permit TVA to perform its functions and meet its responsibilities without, at the same time, doing violence to the investor-owned power companies by encouraging TVA encroachment.

“Second. Provide TVA with self-financing capacity and capability, but, in so doing, not excessively impair the ability of the private electric utilities contiguous to TVA to maintain themselves and provide financing for their own operating areas and customer expansion needs.

“I am concerned lest Congress should enact language which might have the end result of destroying the stability and serviceability of investor-owned power systems which have served their areas and their customers well.”⁴⁰

⁴⁰ Id at p. 13060.

Senator Byrd, echoing the views of Senator Randolph, stated:

"At the same time, Mr. President, I also recognize the necessity for protecting the tremendous investments of private enterprise in the privately owned utility systems. . . ."

"Under the circumstances, my position is clear, I am in favor of the objective sought here so long as a fence is built around the boundaries of TVA, so long as the *legitimate interests of private enterprise are protected*" ⁴¹

The foregoing are only samples of the numerous statements contained in the legislative history of the Act which demonstrate, without doubt, that the primary, if not the sole purpose of the territorial limitation provisions was to protect the business of investor-owned utilities operating in areas adjacent to the TVA area.

B. Given the purpose of the statute to protect KU and others similarly situated from the competition herein complained of, KU has standing to enjoin such competition.

The question presented here is under what circumstances does a complainant have standing to challenge competition by, or under authority of, agencies of the Federal Government. From the decided cases of this Court the answer is clear. A complainant may challenge such competition when it has a right, created by statute, to be free of the competition.⁴² Of course, not every statutory

⁴¹ Id at pp. 13060-61.

⁴² As stated by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U. S. 123, 153-54, "The common law does not recognize an interest in freedom from honest competition; a court will give protection from competition by the Government, therefore, only when the Constitution or a statute creates such a right."

provision which tends to benefit a complainant's competitive position will create enforceable rights, but if the purpose of the statute is to protect the plaintiff from competition, a right to enjoin the competition prohibited by the statute will be inferred. The proper question is not "Is the plaintiff's only injury one of competition?" but rather "Is the plaintiff complaining of competition made unlawful by a statute enacted for the purpose of protecting him from such competition?" This distinction is the thread of the numerous cases which have been decided on the issue of standing to enjoin competition.

For example, since the decision of this Court in the *Chicago Junction Case*,⁴³ it has been held that competing railroads have standing to challenge orders of the Interstate Commerce Commission which affect their competitive position. In that case the Commission had entered an order approving the acquisition by the New York Central Railroad of the control of two independent terminal railroads in Chicago. Competing trunk lines which had heretofore used the services of the terminal railroads brought an action in the Federal district court to have the order of the Commission and the resulting acquisition set aside, and for injunctive relief. On appeal to this Court from a dismissal of the bill by a three-judge district court, it was held that the plaintiffs had standing under the Transportation Act of 1920 to challenge the order of the Commission, as a party in interest within the meaning of the statute. The Court noted that prior to the enactment of the Transportation Act of 1920, the New York Central would have been free to acquire the terminal railroads and exclude competing carriers from the use of the terminals.

⁴³ *Baltimore & Ohio R. R. v. United States*, 264 U. S. 258.

Applying the test of the statutory purpose the Court stated:

"But Transportation Act 1920 repealed that provision in § 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a *special interest* in the proposal to transfer the control to that company." (264 U. S. at p. 267)

Three justices dissented on the ground that the Act did not create any special rights in the plaintiffs and that the action was therefore one to vindicate the rights of the public generally as to which there was no standing. The issue which divided the Court was, therefore, whether the act evinced a purpose to protect the interest of competing carriers from certain types of competitive action, thereby creating a special interest in competitors, or whether it was merely declarative of broad public policy as to which competing carriers had no interest apart from the public generally.⁴⁴

In subsequent cases involving the Transportation Act of 1920, the views of the majority in the *Chicago Junction Case* prevailed.⁴⁵

Subsequently, in *Frost v. Corporation Commission*, 278 U. S. 515, it was held that one having a valid but non-exclusive franchise from the state to operate a cotton gin had

⁴⁴ See the dissenting opinion of Mr. Justice Sutherland, 264 U. S. at pp. 271-273.

⁴⁵ See *Texas & Pacific Ry. v. Gulf C. & S. F. Ry.*, 270 U. S. 266; see also *Alton R. R. v. United States*, 315 U. S. 15; *American Trucking Assn's v. United States*, 364 U. S. 1.

standing to enjoin the state corporation commission from issuing a license to a competing company on the ground that the statute under which the competitor's license was issued was unconstitutional. While the decision is couched in the language of a "property right," the gravamen of the complaint was that statutory licensing provisions enacted to protect the plaintiff from unlawful competition were being unlawfully circumvented.

Standing to complain of competition which by statute is in itself unlawful was also upheld in *Chicago v. Atchison, T. & S. F. Ry.*, 357 U. S. 77. In this case the court, although ultimately finding against the complainant on the merits, stated with respect to standing:

"It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co. v Ickes*, 302 US 464, 82 L ed 374, 58 S Ct 300, and *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 US 118, 83 L ed 543, 59 S Ct 366. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. Cf. *Bell v Hood*, 327 US 678, 90 L ed 939, 66 S Ct 773, 13 ALR2d 383. Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can

lawfully operate without a certificate of convenience and necessity.” (357 U.S. at pp. 83-84)

On the other hand, a complainant has no standing to enjoin competition which is lawful in itself merely on the grounds that it is made possible by the unlawful act of others.⁴⁶ Thus, we would agree with the statement contained in the Brief for TVA (p. 11) that:

“At least since the decision of this Court in *Railroad Co. v. Ellerman*, 105 U. S. 166, it has been settled doctrine that suit may not be maintained in a federal court to enjoin competition *unless the competition invades a legally protected interest*. Hence, a suit by a businessman to protect a non-exclusive franchise from competition that was allegedly made possible or assisted by a government official or agency acting unconstitutionally or illegally will not, *without more*, lie.”

We further agree that KU is not claiming an exclusive franchise, but we most certainly do claim a “legally protected interest in freedom from competition” based upon the 1959 TVA Act, which claim has been upheld by the lower courts in this case. It is this claim which distinguishes this case from the cases principally relied upon in the Briefs of the petitioners, *Alabama Power Co. v. Ickes*, 302 U.S. 464, and *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118.

⁴⁶ Thus, in *Railroad Company v. Ellerman*, 105 U. S. 166, a wharfinger was held to have no standing to enjoin the lease of railroad property to a competing wharfinger on the ground that the railroad was acting ultra vires in leasing the property. The plaintiff had no common law right to be free from the competition of the lessee wharfinger, and the breach by the railroad corporation of its statutory charter did not constitute a breach of any duty owed to the plaintiff apart from the public generally.

There is a certain surface similarity between these cases and the case at bar. Each of the foregoing cases involved a suit by public utilities to enjoin officers or agencies of the United States from taking certain actions or executing certain contracts which would have had the effect of increasing competition between the public utilities and various federally subsidized agencies or cooperatives. But here the similarity ends. In the foregoing cases the competition by the public power agencies was legal in itself and was not prohibited by a federal statute enacted for the purpose of protecting the public utilities from such competition. The actions of the various officers and agencies were attacked on the grounds that either the statutes authorizing such activities were unconstitutional or the officers and agencies had exceeded the authority admittedly granted to them by statute. In each of these cases it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise and that, accordingly, no common law or statutory rights of the plaintiffs had been invaded.

In *Alabama Power Co. v. Ickes*, supra, the Federal Emergency Administrator of Public Works, acting pursuant to authority granted to him under the Emergency Relief Appropriations Act of 1935,⁴⁷ entered into certain agreements with cities in Alabama providing for the making of loans and grants by the Administrator to the cities for the construction of municipal electric distribution systems. Sections 202 and 203 of the Act contained sweeping provisions authorizing the Administrator to prepare comprehensive programs of public works including the transmission of electric energy and to make grants to municipal-

⁴⁷ 49 Stat. 115, 119.

ities and otherwise aid in the financing of such public works projects. In affirming a dismissal of the action for lack of standing to sue this Court held that (1) the plaintiff had no standing as a taxpayer to question the authority of the Federal Administrator to make the loans and grants, because a taxpayer, per se, under the rule of *Massachusetts v. Mellon*, 262 U.S. 447, has no right to enjoin the expenditure of funds from the federal treasury and (2) the plaintiff had no exclusive franchise and the competition complained of was not in itself prohibited by statute and accordingly no common law or statutory rights of the plaintiff had been invaded, citing *Railroad Co. v. Ellerman*, 105 U.S. 166.⁴⁸ The Court likened the position of the plaintiff to one who was about to suffer "injurious consequences from the lawful use of money about to be unlawfully loaned . . ." (302 U.S. at p. 480), and concluded that:

"considered apart, the lender owes the sufferer no enforceable duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any *lawful* way the borrower may choose." (302 U.S. at p. 480)

Applying this analogy to the case at bar TVA does owe KU an enforceable duty to refrain from supplying power outside the TVA service area by virtue of the statutory protection afforded KU under the 1959 TVA Act. Similarly, Powell Valley and the Cities owe a duty to KU to refrain from distributing TVA power in a manner declared unlawful by the Act; i.e. have "the effect, directly or indirectly," of making TVA "or its distributors" a source of power supply outside the TVA service area.

⁴⁸ Supra, note 46.

The Court itself recognized the distinction, noting that under the *Chicago Junction Case*, supra, competitive rights may be asserted where a special interest is recognized by statute and further that a plaintiff, as in *Frost v. Corporation Commission*, supra, may complain of competition which is unlawful in itself.

The decision of this Court in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, supra, is similar to that reached in the *Alabama Power Co.* case. In this case certain public utilities sought to enjoin TVA from generating, transmitting, and selling electricity in competition with the utilities on the ground, primarily, that the provisions of the TVA Act⁴⁹ authorizing such activities were contrary to the Tenth Amendment of the Constitution respecting powers reserved to the states. Again, the utilities had no exclusive franchise and they had no special statutory interest or right to be free from the threatened competition. The Court accordingly held that the plaintiffs had no standing, concluding that the action could not be maintained "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." (306 U.S. at p. 137)

Petitioners also make reference in their Briefs to the case of *Perkins v. Lukens Steel Co.*, 310 U.S. 113, in support of their contention that KU has no standing to maintain this action. This action involved the construction of the Public Contracts Act of June 30, 1936⁵⁰ concerning minimum wage conditions in industries selling supplies to the Federal Government. The plaintiffs sought to enjoin

⁴⁹ 16 USC § 831, et seq.

⁵⁰ 41 USC § 35 (Walsh-Healy Act).

the Secretary of Labor and others from enforcing certain minimum wage determinations on the ground that the Secretary had incorrectly interpreted the statutory guide lines for making such determination. In holding that the plaintiffs had no standing, the Court once again looked to the purposes of the statute relied upon and found that such purposes were not for the protection of the plaintiff but on the contrary for the protection of the Government, stating "It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. . . . The duty is imposed upon the officers of the Government . . . that duty is owing to the Government and no one else." (310 U. S. at p. 126).

The rule educed from the foregoing cases,—if the purpose of the statute is to protect the competitive position of the plaintiff standing will be implied but if the statute is not intended to create rights in the plaintiff apart from the rights of the public generally standing will be denied—has been consistently applied in numerous lower court decisions, including the National Banking Act cases relied upon by the lower courts in this action⁵¹ and the cases arising under the Rural Electrification Act,⁵² the Federal

⁵¹ *National Bank of Detroit v. Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir.), cert. denied, 358 U. S. 830; *Whitney National Bank v. Bank of New Orleans*, 323 F. 2d 290 (D.C. Cir.), reversed on other grounds, 379 U. S. 411; *Commercial State Bank v. Gidney*, 174 F. Supp. 770 (D.D.C.), affirmed, 278 F. 2d 871 (D.C. Cir.). See also *Commercial Security Bank v. Saxon*, 236 F. Supp. 457 (D.D.C.), affirmed, 385 U. S. 252 (the issue of standing was not raised before this Court).

⁵² *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (D.C. Cir.), cert. denied, 350 U. S. 884; *Rural Electrification Administration v. Central Louisiana Electric Co.*, 354 F. 2d 859 (5th Cir.), cert. denied, 385 U. S. 815; *Rural Electrification Administration v. Northern States Power Co.*, 373 F. 2d 686 (8th Cir.), cert. denied, 387 U. S. 945.

Housing Acts,⁵³ and the Merchant Marine Act,⁵⁴ cited in petitioners' Briefs.

For example, in *National Bank of Detroit v. Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir.), cert. denied, 358 U. S. 830, a state bank sought to enjoin the United States Comptroller of the Currency from issuing a certificate of authority to a national bank to open a branch bank in the same city where the state bank had an existing branch. Pursuant to the National Banking Act,⁵⁵ a national bank is authorized, subject to the approval of the Comptroller of the Currency, to establish branch banks at any place within the state in which the bank is situated, if such establishment is expressly authorized for state banks by the statutes of the state in question and subject to the restrictions as to location imposed on state banks by state law. The applicable Michigan statute⁵⁶ provided that no branch bank might be established in a city in which a state or national bank or branch thereof was then in operation. On appeal from the order of the district court granting the injunction, the Comptroller of the Currency asserted that

⁵³ *Pittsburgh Hotels Ass'n, Inc. v. Urban Redevelopment Authority*, 309 F. 2d 186 (3rd Cir.), cert. denied sub nom. *Hilton Hotels Corp. v. Urban Redevelopment Authority*, 372 U. S. 916; *Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency*, 310 F. 2d 99 (7th Cir.), cert. denied, 373 U. S. 914; *Berry v. Housing and Home Finance Agency*, 340 F. 2d 939 (2nd Cir.); *Taft Hotel Corp. v. Housing and Home Finance Agency*, 262 F. 2d 307 (2nd Cir.), cert. denied, 359 U. S. 967.

⁵⁴ *Pennsylvania R. R. v. Dillon*, 335 F. 2d 292 (D.C. Cir.), cert. denied sub nom. *American Hawaiian S. S. Co. v. Dillon*, 379 U. S. 945.

⁵⁵ 12 USC § 36c.

⁵⁶ Mich. Stat. Ann. § 23. 762.

the plaintiff had no standing to sue. In rejecting this contention the Court of Appeals stated:

"As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes subjecting national banks to the same rules of law as cover state banks. The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated." (252 F. 2d at p. 544)

A similar result was reached by the Court of Appeals for the District of Columbia Circuit in the case of *Whitney National Bank v. Bank of New Orleans*, 323 F. 2d 290 (D. C. Cir.), reversed on other grounds, 379 U. S. 411. In the course of its opinion upholding the standing of the plaintiffs to seek an injunction against the Comptroller, the Court made the following pertinent comments respecting standing:

"The Comptroller's brief contends that 'appellees can point to no legal or actionable wrong to them arising from the opening of a new national bank.' It is, of course, true, as held in *Alabama Power Co. v. Ickes*, . . . that one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which

simply increases the amount or effectiveness of competition.

* * * *

“The state banks say that thus they have a right, under the combination of federal and state statutes, to be free of the competition in east Jefferson Parish which would result if Whitney of Orleans Parish is allowed to establish branches in east Jefferson where the state law forbids them to go. The state banks allege further that the Comptroller is not authorized to permit, but rather is prohibited by law from permitting, Whitney of New Orleans to establish branches in east Jefferson, *and that his unlawful act in doing so would result in illegal competition and a consequent violation of their right, guaranteed by state and federal statutes, to be free of such competition.*” (323 F. 2d at pp. 298-99).

The Court clearly distinguished that case from *Alabama Power Co. v. Ickes*, supra, and its own prior decision in *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (D. C. Cir.), cert. denied, 350 U. S. 884, and similar cases, stating:

“The distinction between this case and those cited by the Comptroller as to standing to sue was carefully drawn by the Supreme Court in *Alabama Power Co. v. Ickes*, . . . when it said:

“‘*Frost v. Corporation Commission*, 278 U. S. 515. 49 S. Ct. 235, 73 L.Ed. 483, relied upon by petitioner, presents an altogether different situation. . . . We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost’s right to an injunction against the commission and the Durant company. See *Corporation*

Commission v. Lowe, 281 U. S. 431, 435 [50 S. Ct. 397, 74 L.Ed. 945]. *The difference between the Frost case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful.* [Emphasis supplied by the Court.]

“Although the Frost case is not factually identical with this one, it is sufficiently similar to be dispositive of the question of standing. The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. *The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.*”⁵⁷

In the instant case, as in the National Banking Act cases, KU is seeking to enjoin the defendants from engaging in unlawful competition specifically prohibited by the

⁵⁷ On appeal this Court (379 U. S. 411) reversed the decision of the Court of Appeals on the ground that pursuant to the Bank Holding Company Act, 12 USC § 1846, the question of the propriety of the establishment of the holding company in question and its subsidiary bank must be determined in accordance with the administrative procedures set forth in the Holding Company Act and should properly be determined in an appeal from an order of the Federal Reserve Board then pending before the Fifth Circuit. The Court was careful to point out that “we do not say that under no circumstances may the Comptroller be restrained in equity from issuing a certificate to a new bank.” (379 U. S. at p. 423). See also *Commercial Security Bank v. Saxon*, 236 F. Supp. 457, affirmed, 385 U. S. 252.

1959 TVA Act. KU, like the banks in the cases cited above, does not have an exclusive franchise to be free from any lawful competition from other utilities. But, as in the case of the banks, it has a right to be free from illegal competition in contravention of the proscriptive provisions of the Act, which provisions were designed to protect KU and other public utilities from that very competition.

Turning now to the several lower court decisions involving the Rural Electrification Act,⁵⁸ we see again that each of these decisions is based upon a determination by the courts that the provisions of the Act in question were not enacted for the purpose of protecting the plaintiffs from competition. The plaintiffs in these cases were seeking to enjoin the Rural Electrification Administration (REA) from making loans to cooperative groups for the purpose of constructing electric generation and transmission facilities in competition with existing facilities of the public utility plaintiffs. The utilities contended that they had standing to maintain the actions based upon the provisions of the Rural Electrification Act⁵⁹ and regulations issued thereunder, and in particular under the provisions of 7 USC § 904 which authorizes the administrator to make loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service . . ." The plaintiffs contended that the making by the Administrator of loans to cooperatives which might result in sales of electricity to consumers who

⁵⁸ Supra, Note 52.

⁵⁹ 7 USC § 901 et seq.

were not living in rural areas or to consumers who were then receiving central station service from existing utilities was contrary to the provisions of the Act; that the central station language was inserted in the Act for their protection, and, accordingly, they had standing to sue.⁶⁰

Rightly or wrongly, each of the lower courts which has considered this question has determined that the purpose of the provisions of the Rural Electrification Act and regulations thereunder relied upon by the several plaintiffs was *not* to protect public utilities from competition but to properly conserve federal funds for the benefit of the cooperative borrowers as well as the Treasury, and for the ultimate benefit of the rural population served by the cooperatives.

As stated in *Rural Electrification Administration v. Northern States Power Co.*, 373 F. 2d 686 (8th Cir.), cert denied, 387 U. S. 945:

"If anyone is the beneficiary of the regulation, it is the rural consumer of cheap but efficient electrical energy. The intent of the regulation is to assure the borrower, not the private power supplier, the 'most advantageous power supply arrangement.'

It is difficult to conclude that the purpose of the regulations is to provide previously nonexistent rights to the private power supplier . . . In administering the REA program 'freedom from competition' is not

⁶⁰ In what is apparently the only case which decided this question on the merits, *Missouri Power & Light Co. v. Lewis County Rural Electric Cooperative Association*, 235 Mo. App. 1056, 149 S. W. 2d 881, it was held that so long as the purpose of the loans was to foster rural electrification, the fact that consumers in other than rural areas who were receiving central station service might also be served was immaterial.

a legitimate end of the legislation or the regulations promulgated thereunder. More appropriately, we feel the responsibilities under the regulation are as set forth in its preamble. The language and the legislative background of the regulation makes it apparent that Congress was merely seeking a more effective means to police the REA loans. Under such circumstances we find Congress did not intend to create any legally enforceable rights for the private power supplier." (373 F. 2d at p. 696)

It was also noted in the REA cases⁶¹ that Congress retained effective control over loans to the REA by virtue of the appropriation process and review by the Comptroller General. It is precisely this lack of control over the electric power program of TVA by virtue of the proposed financing of the program through the public issuance of bonds, which led Congress to enact the territorial limitation provisions of the 1959 Act. This was put most clearly by the authors of both the Senate and the House versions of the territorial limitation provisions. Thus, Senator Randolph, in his minority views appended to the Senate Committee report stated:

"Unwarranted extension of facilities and service to meet normal TVA growth requirements for its basic customer area has heretofore been controlled by:

"(1) Appropriations by the Congress; and

"(2) A gentlemen's nonencroachment agreement between TVA and the investor-owned power companies.

"Since TVA expansion would no longer be controlled through the appropriation procedure, it is

⁶¹ Supra, note 52.

essential that limitations compatible with the gentlemen's agreement now existing should clearly be established in this legislation."⁶²

The same point was made by Representative Vinson, author of the House version, speaking in favor of passage during the final debate.⁶³ Thus, the very purpose of the territorial limitation provisions was to provide protection for public utilities in the *absence* of congressional control through the appropriations procedures. This is not to say, of course, that Congress retains no control over TVA's electric power program. It created TVA, and could abolish it, and, similarly, could deny it the power in the future to borrow additional funds from the public. But, Congress acknowledged that by permitting TVA to finance its operations through public bond issues it was surrendering a measure of control over the TVA power program and that public utilities would no longer be adequately protected against TVA expansion by reason of congressional control of the purse strings.

In the cases concerning the Federal Housing Acts, relied upon by petitioners,⁶⁴ the denial of standing to the

⁶² S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 56, 2 U. S. Code Cong. & Ad. News 86th Cong. 1st Sess., p. 2021.

⁶³ Mr. Vinson stated:

"So long as the Congress of the United States had to provide appropriations for any expansion programs, there was, for all practical purposes, no need for a statutory limitation on the expansion of the TVA service area.

"But now that it is proposed by the President, and by a majority of the Congress, that TVA issue revenue bonds for the purpose of building new generating and other facilities, the question of territorial expansion becomes a grave one not only to the privately owned utility systems that operate adjacent to TVA, but also to the future of all privately owned utility systems throughout the Nation, . . ." 105 Cong. Rec. p. 14121 (July 23, 1959).

⁶⁴ *Supra*, Note 53.

plaintiffs was again predicated on the lack of congressional intent to protect the plaintiffs, in this case property owners affected by urban renewal programs. As stated in *Berry v. Housing and Home Finance Agency*, 340 F.2d 939 (2nd Cir.):

"Appellants attempt to distinguish the Taft Hotel case on the claim that the 1959 amendment to the Housing Act, 42 U. S. C. § 1456(g), gave them the requisite standing. *There is, however, no indication either in the language of the amendment or in the legislative history of any such intent.* Section 1456(g) is an apt provision to safeguard the predominantly residential character of urban renewal projects and to insure that the limited Federal funds available for assistance to such projects shall not be expended for commercial hotels if they are not needed." (340 F. 2d at p. 940)

Again, as in the REA cases, the court simply found, whether rightly or wrongly, that the statute in question was not enacted for the purpose of protecting the plaintiffs, but for other general public purposes.

Likewise, in *Pennsylvania R.R. v. Dillon*, 335 F. 2d 292 (D. C. Cir.), cert. denied sub nom. *American Hawaiian S.S. Co. v. Dillon*, 379 U. S. 945, the requisite congressional intent to protect the plaintiff shipping company was expressly found lacking.

The proper rule to be derived from the various cases involving standing to sue to enjoin competitive action has been well stated by Professor Jaffe:

"Thus, the clue to standing in these cases has been to look as did Brandeis in *Chicago Junction*, to the statutory purposes. If protection of the competitive

position is one—it need not, as we have insisted, be the only—purpose, then the plaintiff's stake in his competitive position is 'legally protected' and he has standing. I do not mean to assert that a statute's purpose on this score is always plain. Many licensing schemes are quite obviously directed toward the mitigation of the competitive rigor, and others are not. Is the plaintiff's continued well-being one of the statute's concerns? This is the question, rather than the abstract, vague, ill-focused query whether the plaintiff has a 'definite legal right to be immune from competition.' ⁶⁵

This is the rule that has been followed in the many cases decided on the question, both by this Court and the lower courts. Applying this rule to the case at bar there can be no question that KU has standing to maintain this action and the lower courts have so held in every previous case involving the 1959 TVA Act.⁶⁶

C. It is not a necessary condition of KU's standing to sue that the 1959 TVA Act expressly authorize civil suits.

Petitioners have contended that the absence of any provisions in the 1959 TVA Act authorizing civil suits or administrative review precludes the bringing of this action. The proper rule is in fact the opposite of this contention. Judicial review of administrative action is the rule and not the exception and a right to review will be presumed unless the statute provides to the contrary.

⁶⁵ Jaffe, *Judicial Control of Administrative Action*, pp. 509-10 (1965).

⁶⁶ In addition to the decisions in the two lower courts in this action, standing to sue under the 1959 TVA Act has been upheld in interlocutory orders in two other cases, *Georgia Power Co. v. Tennessee Valley Authority*, Civil No. 1788 (N. D. Ga.); and *Kentucky Utilities Company v. Tennessee Valley Authority*, Civil No. 4385 (W. D. Ky.).

It has long been established that a right of action may be implied in favor of one injured as a consequence of a violation of a Federal statute, even though the statute contains no express provision for civil remedies. *Texas & Pacific Ry. v. Rigsby*, 241 U. S. 33.⁶⁷

In what is perhaps the leading case concerning the presumption in favor of judicial review of administrative action, *Stark v. Wickard*, 321 U. S. 288, this Court stated:

"When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." (321 U. S. at p. 309)

This presumption in favor of judicial remedies was indulged in *Stark v. Wickard*, even though the statute in question provided an administrative remedy for certain classes of persons not including the plaintiff. The judicial remedy has even been upheld in the face of a statute which purported to make the administrative decision "final." *Harmon v. Brucker*, 355 U. S. 579.⁶⁸ As stated in *Leedom v. Kyne*, 358 U. S. 184; "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

⁶⁷ "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, . . . 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute . . . for the recompense of a wrong done to him contrary to the said law.'" 241 U. S. at p. 39.

⁶⁸ See also *Brownell v. Tom We Shung*, 352 U. S. 180.

The presumption in favor of judicial review has been strengthened with the enactment of Section 10 of the Administrative Procedure Act.⁶⁹ We do not contend that any new substantive rights have been created by this statute but it can certainly be said to supply a remedy if one be lacking, and the exemption of agency action from judicial attack, whether by appeal from applicable administrative proceedings or by original suits in equity, will not be inferred unless the statute in question clearly so provides.⁷⁰ Therefore, the absence of provisions for judicial review does not imply a lack of standing to challenge allegedly unlawful acts of the petitioners.

Petitioners point to the lack of any provisions in the Act for notice of or hearing upon TVA's determination as to the boundaries of the area in which it is permitted to be a source of power supply and a corresponding lack of any provisions in the Act for appeals by "persons aggrieved" etc. From the lack of such provisions in the 1959 TVA Act and the presence of provisions for administrative proceedings and judicial review thereof in a number of federal regulatory acts, it is argued that Congress intended to deny standing to utilities to contest violations of the Act. The regulatory acts referred to by the petitioners, the Federal Power Act, the Federal Communications Act, and others⁷¹ concern the delegation by Congress of the power to regulate individuals and businesses in various fields of commerce. In order to accomplish the

⁶⁹ 5 USC § 1009.

⁷⁰ *Brownell v. Tom We Shung*, 352 U. S. 180; *Freeman v. Brown*, 342 F. 2d 205 (5th Cir.). Cf. *Shaughnessy v. Pedreiro*, 349 U. S. 48.

⁷¹ See Brief for TVA, p. 15 n. 10-12.

regulatory purposes, it is necessary, also, to establish proper administrative procedures for rule making and for adjudication of controversies among the class to be regulated. The manner and scope of judicial review of such quasi-legislative and quasi-judicial activities on the part of the regulatory agencies is frequently specified in the statutes. In the instant case, TVA is not a regulatory agency, the TVA Act does not confer upon TVA any rule making power with respect to the utility industry or any power to adjudicate controversies among KU and other utilities or between TVA and KU. Under these circumstances, provisions in the statute for administrative proceedings and judicial review thereof would be singularly inappropriate.

On the other hand, it is obvious from the legislative history of the Act that Congress fully expected that questions concerning the proper interpretation of the Act would be the subject of litigation and that the rights conferred on utilities by the Act would be judicially protected. The Senate Committee on Public Works rejected the House version of the bill for the reason, among others, that:

"The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds by TVA."⁷³

⁷³ S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 9; 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2008 (1959). The Senate Committee version was subsequently rejected on the floor of the Senate in favor of a modified form of the House version.

The Senate Committee believed that its version of the bill would "reduce the possibility of *litigation* and confusion arising from ambiguous terms."

In the debate in the House of Representatives just before final passage of the bill Representative Davis of Tennessee, the floor manager of the bill, in explaining the Senate amendment which added the five-mile expansion provisions, stated:

"The Senate has changed this bill in this regard. They recognized that the House provision would undoubtedly lead to extensive litigation around the periphery of the area so receiving TVA power."⁷⁴

There is no indication in the legislative history of the Act that Congress was of the opinion that utilities would have no standing to seek judicial protection of the rights being conferred on them by the Act. On the contrary, the bill was amended for the stated purpose of eliminating ambiguities which might prove troublesome in subsequent litigation.

II.

The Court of Appeals correctly construed the provisions of the 1959 TVA Act as prohibiting TVA electric service in an area of Claiborne County, Tennessee, served exclusively by KU on July 1, 1957.

As there is no factual dispute present, we will first discuss the meaning of the Act as disclosed by the statutory language itself and the legislative history.

⁷⁴ 105 Cong. Rec. 14112 (July 23, 1959).

A. The History and Meaning of the Act.

As noted by the Court of Appeals (375 F. 2d at pp. 410-412), the 1959 TVA Act was the result of some four years of legislative effort and a number of bills, some with and some without territorial limitations, were unsuccessfully introduced from 1955 to 1959. In 1959, H.R. 3460 of the 86th Congress was introduced and this Bill, with substantial amendments, was finally enacted.

Four separate versions of the territorial limitation provisions were considered in the course of the passage of H.R. 3460 through both Houses of Congress. These versions were: (1) the version originally introduced in the House, (2) the version reported out of the House Committee and passed by the House (the so-called "Vinson Amendment"), (3) a substantially different version reported out of the Senate Committee, and finally (4) the version introduced on the floor of the Senate by Senators Talmadge and Randolph and subsequently enacted into law (the so-called "Randolph Amendment"). For convenience, the four versions are reproduced in an appendix to this Brief.

The version originally introduced in the House of Representatives contained a provision which would have restricted TVA service to those counties "which lie in whole or in part within the Tennessee River drainage basin or the service area in which power generated by the Corporation [TVA] is being used on July 1, 1957," plus an additional area five miles around the boundaries of such counties. At the hearings on this Bill⁷⁵ representatives of public utilities operating in areas adjacent to the TVA service

⁷⁵ Hearings before House Committee on Public Works, 86th Cong., 1st Sess., March 10-11, 1959 (No. 86-3, H.R. 3460).

area strenuously objected to these provisions. Their objections were based upon the fact that the boundaries of the existing service area of TVA did not conform to county boundary lines. As a result, the Bill would not have served the purpose of limiting TVA expansion but would have been an invitation to TVA and its distributors to extend service to the borders of any county which was then only partly served by TVA (e.g. Claiborne County), and to invade those counties in the Tennessee River drainage basin then served by other utilities. It was estimated that such expansion would increase the existing TVA service area by some 31%⁷⁶ and drastically affect the business of the utilities operating in areas adjacent to TVA. Among those objecting to the bill was R. M. Watt, Board Chairman of KU. In the course of his statement to the House Committee, Mr. Watt presented a map⁷⁷ showing the territory served by KU in Kentucky, Virginia, and Claiborne County, Tennessee, stating:

"The territory shown in red at the right hand side of the map covers three counties in western Virginia in which the subsidiary, Old Dominion Power Co., renders service, *and one county in Tennessee in which the company renders service*, all of which counties lie in the Tennessee river drainage basin. The provision of the bill would permit expansion of TVA service in those counties . . ."⁷⁸

At this point, in response to such objections to the existing Bill, Representative Vinson appeared before the Committee and offered an amendment which provided that the

⁷⁶ Id at p. 150, 198.

⁷⁷ Ex. 100—R. 587, Ex. Vol. II Sheet 9b.

⁷⁸ Hearings, *supra* note 75 at p. 230.

facilities of TVA would not be used "for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957."

In offering his amendment, Mr. Vinson noted that TVA then served approximately 80,000 square miles and the Bill as introduced in the House would authorize an expansion of the TVA area by approximately 25,000 square miles.⁷⁹ He further noted that "TVA has been operating within its present area for many years under a gentlemen's agreement between TVA and surrounding private utility companies," and stated that the purpose of his amendment was to convert the "gentleman's agreement" into law.⁸⁰ The subsequent legislative history contains many references to the so-called "gentleman's agreement" between TVA and neighboring utilities (such as the 1952 agreement among KU, Powell Valley and TVA) and also to the 80,000 square mile service area of TVA.

The Committee adopted the Vinson Amendment and, after adding a specific exception to the service area limitation for eight named cities in Tennessee and Kentucky, the Bill was reported out of Committee, passed by the House, and referred to the Senate Committee on Public Works, where a second round of extensive hearings was held.⁸¹

A majority of the Senate Committee found the House Bill too restrictive and substituted language which would have permitted substantial expansion of TVA service. The

⁷⁹ Id at p. 109.

⁸⁰ Id at p. 108.

⁸¹ Hearings before Subcommittee of Senate Committee on Public Works, 86th Cong., 1st Sess., June 9-10, 1959 (H.R. 3460 and S. 931).

Senate Committee version contained only two basic restrictions on TVA service: (1) TVA was prohibited from serving any cities not served on July 1, 1957, having a population in excess of 5,000, or 10,000 in the case of cities owning their own electric systems, and (2) there was an overall limitation on the expansion of TVA service—TVA could not increase by more than the lesser of 2,000 miles or 21½%, “the area for which the Corporation was the *primary source of power supply* on July 1, 1959.” Here, for the first time, the phrase “primary source of power supply” appears in the Bill, in substitution for the phrase “service area.” As will be shown later, the phrases have the same meaning. A somewhat expanded list of excepted cities was also included in the Senate Committee version of the bill.

The Senate Committee version was unacceptable to a minority of the Committee, including Senator Randolph, who filed Supplemental Views dissenting from the Committee Report. Noting that TVA growth requirements had theretofore been controlled by Congressional appropriations and the “gentleman’s nonencroachment agreement” between TVA and neighboring power companies, Senator Randolph concluded: “Since TVA expansion would no longer be controlled through the appropriation procedure, it is essential that limitations compatible with the gentleman’s agreement now existing should clearly be established in this legislation.”⁸²

In accordance with the views expressed in his minority report, Senator Randolph proposed an amendment on the floor of the Senate which again rewrote the entire area

⁸² S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 56, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2021 (1959).

limitation provisions. This amendment was passed by the Senate, referred to the House, and there passed and enacted into law.

Before considering in some detail the provisions of the Act as finally passed it should first be emphasized that the final version of the Act, the so-called "Randolph Amendment," was substantially different from the version reported out of the Senate Committee, and represented a return to the strict area limitation provisions of the House Bill (the Vinson Amendment) with certain carefully defined exceptions. In their Briefs to this Court and arguments to the courts below, petitioners have placed considerable emphasis upon the language of the Senate Committee Report. Such reliance on the language of the Senate Committee Report, relating to a version of the Bill which was not enacted, has resulted in a complete misreading of the Act by petitioners and has led them to the wholly insupportable conclusion that the area of Claiborne County served exclusively by KU on July 1, 1957, was somehow within the area for which TVA was the "primary source of power supply". We will now examine the several provisions of the Act in its final form.

1. *The area for which TVA or its distributors were the primary source of power supply.*

Petitioners' whole position in this case is based upon their contention that the area of Claiborne County served exclusively by KU and contiguous to the remainder of the KU service area in Kentucky, was somehow within a larger area, not otherwise defined by Congress, for which TVA was the "primary" source of power supply. The argument is that since the statute speaks of the area for which TVA was the "primary", as opposed to the "sole" source of

power supply, the so-called "primary area" must include some customers receiving electric service from another source. In this case the non-TVA customers so selected for inclusion in the "primary area" are the some 2,000 KU customers in the area of Claiborne County served exclusively by KU.

Under this theory, TVA is free to choose any point on the actual geographic boundary of its service area and arbitrarily reach out and include, as within its "primary area", adjacent areas served exclusively by other utilities. Congress obviously intended no such result when it substituted the "primary source" language for the phrase "service area."

In the course of the various hearings and debates on the TVA revenue bond financing bills frequent reference was made to the fact that TVA was the sole supplier of electric power in an area of approximately 80,000 square miles.⁸³ As stated by TVA's general counsel at the hearings before the House Committee, "The Tennessee Valley Authority is the sole source of power supply for an area of about 80,000 square miles."⁸⁴ Maps were exhibited to Committees of Congress to show in rough approximation this 80,000 square mile area.⁸⁵ In testifying as to how these maps were prepared, TVA's Manager of Power, Mr. Wessenauer, stated:

"Well, the information basically, was information which we had available to us in our files as to the general extent of the areas served by the individual municipal and cooperative distributors of TVA power, and

⁸³ E.g. Hearings before Subcommittee on Flood Control of House Committee on Public Works, 85th Cong., 1st Sess., TVA financing, March 28-May 7, 1957, p. 66-67 (No. 85-5, H.R. 3236 and 4266).

⁸⁴ Hearings, *supra* note 75 at p. 76.

⁸⁵ *Id* at p. 5, 14.

the lines were intended to be an approximation of the extent to which their lines *went geographically*.

* * * * *

“And they were the best information we had in our offices at the time the maps were prepared. They were intended to give the general picture of where the distributors were, municipal and cooperative distributors *were carrying TVA power.*”⁸⁶

The Senate Committee also noted that “TVA is the sole supplier of electric power for an area of about 80,000 square miles . . .”⁸⁷

Both the House version of the Bill, which refers to the “service area” of TVA, and the language of the Act, which refers to the area for which TVA was the “primary source of power supply,” refer to that geographic area of approximately 80,000 square miles where the consumers of TVA power were physically located on July 1, 1957. This was the area which had been basically stabilized under the “gentleman’s agreements” and Congress did not intend to include within the area any adjacent areas being supplied with electricity from another source.

The Senate Committee objected to the use of the term “service area” as it appeared in the House version of the Bill, stating:

“The term ‘service area’ is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers.”⁸⁸

⁸⁶ R. 291.

⁸⁷ S. Rep. No. 470, *supra* note 82 at p. 2.

⁸⁸ *Id* at p. 8.

"The contracts under which TVA sells power to distributors do not limit the area in which those distributors may sell power. Thus only a few of the distributors have a legally defined service area. The area where each distributor sells power is determined by community growth and the relationship between neighboring distributors. Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."⁸⁹

Senator Randolph's Amendment, although returning to the House concept of restricting TVA to the area served in 1957, retained the Senate Committee phrase, "the area for which TVA was the primary source of power supply," rather than the "service area" language of the House.

In addressing the House just before final passage of the Act, Representative Vinson, in the course of explaining the several Senate amendments, stated:

"As we all know, the TVA service area today consists of about 80,000 square miles of territory. . . . In providing an area limitation, the Senate, instead of using the definition of 'service area,' which seemed to be confusing to some, referred instead 'to the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.'

"The words 'primary source of power supply on July 1, 1957' have the same meaning as the language 'service area of the Corporation as it existed on July 1, 1957.'"⁹⁰

⁸⁹ Id at p. 9.

⁹⁰ 105 Cong. Rec. 14121 (July 23, 1959).

Representative Davis, floor manager of the Bill in House, also noted with respect to the Randolph Amendment that "This amendment accomplishes the same purpose as the corresponding provision in the House Bill of limiting the area within which TVA power may be made available to the general area supplied by power on July 1, 1957, but it provides a more workable formula."⁹¹

The reasons given by the Senate Committee for substituting the primary area language for "service area", i.e. (1) that TVA had no service area as such, its service area being that of its distributors, and (2) that there might be areas where the lines of the TVA distributors and other utilities were so interlaced that no definite boundary could be established, does not constitute any basis for an interpretation that the language was intended to permit expansion of TVA service beyond the existing boundary of that service in 1957, into areas where TVA was no source of power supply at all, much less the "primary source." There is a well-defined boundary between the respective service areas of KU and Powell Valley which has been respected by the parties in the past under the several territorial service agreements and was precisely defined on a detailed map prepared by KU and Powell Valley jointly. It cannot at this late date be argued that the lines of KU and Powell Valley are so "interlaced" that no determination of their respective service areas can be made. In fact, a line of Powell Valley crosses the KU service area at only one point in the 14 mile corridor from the Kentucky border to Tazewell, and at the point of the line crossing there are a cluster of four customers of KU.⁹²

⁹¹ Id at p. 14114.

⁹² Ex. 25—R. 386, 758; Ex. 24—R. 384, Ex. Vol. II, sheet 3b. (The line crossing area is shown at the top of the maps.)

Petitioners, relying on the Senate Committee Report, contend that Congress did not intend to establish a definite boundary line for TVA service, but desired some "elasticity and adjustment" at the discretion of the TVA Board. The Senate Committee did find "problems inherent in an attempt to establish a rigid boundary for limitation of power service." Thus:

"The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power. The proposed amendment would permit an increase of the lesser of: (a) 2½ percent of the area for which TVA was the chief or principal supplier of power on July 1, 1957, or, (b) 2,000 square miles."⁹³

And further believed that:

"... the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise."⁹⁴

A minority of the Committee, including Senator Randolph, felt otherwise. The Randolph Amendment was a return to the House concept of confining TVA service to its existing service area, and "elasticity and adjustment" at the discretion of the TVA Board was replaced by enumerated and clearly defined exceptions to the service area limitation.

⁹³ S. Rep. No. 470, *supra* note 82 at p. 8.

⁹⁴ *Id* at p. 9-10.

Thus, Senator Randolph, in proposing his amendment on the floor of the Senate, stated:

"It is evident that TVA expansion outside of its existing power system area can come about only through TVA acquiring customers who are now being served, directly or at wholesale, by utilities providing service in the adjacent area.

"Sound economic policy dictates that *well-defined service areas be established* in the public utility field.

"Mr. President, I know it is the clear intent of the Senate Committee on Public Works — as it must have been the intent of the House — *to indicate clearly that authority is not to be given TVA, by general language, to engage in expansion other than that occasioned by the normal growth of TVA's existing territory.*

"But the language used to spell out this desired result is, in my opinion susceptible of interpretations which might lead to the subsequent assertion that powers not now intended to be conferred actually have been made legal.

"It has been my privilege to join with the experienced and able junior Senator from Georgia [Mr. Talmadge] in the presentation of *definitive language* which preserves the original intent of the congressional mandate under which TVA came into existence.

"It seeks, however, and I believe effectively so, to clarify TVA's area of service."⁹⁵

The Court of Appeals, following the clear Congressional mandate, correctly held that the existing boundary between

⁹⁵ 105 Cong. Rec. 13060 (July 9, 1959).

the service area of Powell Valley and the service area of KU was the boundary of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

As the petitioners do not claim that Powell Valley service in the KU service area of Claiborne County comes within any of the specified exceptions in the Act, our discussion of the statute could stop here. On the other hand, we believe that a brief discussion of these exceptions will serve to further illustrate the correctness of the holding of the Court of Appeals with respect to the meaning of the basic service area limitation.

2. *The exception for the five-mile growth area.*

As a compromise between the strict House version of the Bill (the Vinson Amendment) which would have confined TVA to its 1957 service area with no provision for growth, and the Senate Committee version which, with some exceptions, would have permitted unlimited expansion up to 2,000 square miles in any direction, the final Act permitted an expansion of five miles in areas contiguous to the TVA service area when *necessary* to care for the growth of TVA service *within* the area. This provision was taken from the original House version in which county boundaries were the determinative factor, and was added to alleviate the situation where TVA-served cities on the border of the TVA area might expand into adjacent areas by annexation or otherwise.⁹⁶ Consistent with the reason for this exception, municipalities receiving electric service

⁹⁶ See Hearings, *supra* note 75 at pp. 50-52; and see 103 Cong. Rec. 142205 (August 9, 1957) where the five mile provision was first included.

from another source, such as Tazewell and New Tazewell, were expressly excluded from the five-mile growth area.

The application of the statutory scheme to the facts of this case is perfectly clear. Under any rational interpretation of the Act, Tazewell and New Tazewell are outside the TVA service area. Although the two cities are within five miles of the boundary of the TVA service area, they were also incorporated municipalities, receiving service from another source (KU) in 1957, and cannot be taken by TVA under the five-mile growth provision of the Act. This limitation was specifically designed to prevent the extension of TVA service into cities, such as the Tazewells, near its boundaries but served by other utilities.

3. *The exception for unserved areas within the area in which TVA had generally established electric service.*

Even if the Court were to accept the argument of TVA that Tazewell and New Tazewell were somehow inside the periphery of the TVA primary service area, the provisions of the statute discussed below would still prevent TVA service to the Tazewells.

The Senate Committee Report stated with respect to the House Bill:

*"Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. . . . The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving."*⁹⁷

⁹⁷ S. Rep. No. 470, *supra* note 82 at p. 9.

Senator Randolph, in his Supplemental Views, noted the existence of this problem; stating:

"Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957."⁹⁸

With respect to this problem, an entirely new provision was inserted in the Randolph amendment as a compromise between the House and Senate Committee versions of the Bill, which provision is as follows:

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer *within any area* in which the Corporation or its distributors *had generally established electric service* on July 1, 1957, and to which electric service was *not* being supplied from any other source on the effective date of this Act."

The resulting compromise provision permits TVA and its distributors to serve new customers in isolated areas or islands wholly surrounded by the TVA service area, but only if they were not receiving electric service from another source on the date of the Act. The defendants argue that this provision of the Act does not mean what the language clearly dictates and what all of the legislative history expressly says that it means.

In attempting to avoid this further prohibition of TVA service in the Tazewells, Petitioners contend, and the District Court apparently agreed, that this provision of the Act has reference to some area beyond or outside the

⁹⁸ Id at p. 56.

periphery of TVA's service area. There is nothing in the statute or its legislative history to support such a strained interpretation.

First, the statute clearly speaks of customers "within" any area in which TVA had generally established electric service. The legislative history makes clear that this provision concerns isolated islands surrounded by the TVA service area.

In the final House debate before passage of the Act, Representative Vinson explained to the House this new provision which the Senate had added, as follows:

"[T]he amendment does permit TVA or its distributors to supply electric power to customers within the area in which TVA or its distributors had generally established electric service on July 1, 1957 so long as no electric service was being supplied to such customers from another source on the effective date of this act. *This is not intended as an enlargement of the existing territory, but only to permit TVA and its distributors to supply power to small, unserved islands or "isolated areas" within the general area already being served by TVA and its distributors.*"⁹⁹

As noted above, the Senate Committee desired to "permit minor adjustments *within*, and *around* the periphery of, the TVA area." In the final Act, the periphery problem was solved in the provision for the five-mile growth area. Problems of adjustments *within* the general area of TVA service were solved by the above provisions regarding islands within the general area of TVA service. In each instance in the Senate Committee Report where the phrase

⁹⁹ 105 Cong. Rec. 14121 (July 23, 1959).

"general area" appears, the context in which such phrase is used demonstrates that the Committee had reference to areas within or surrounded by the TVA service area. For example, the Committee desired to "enable rural cooperatives to serve new rural customers *within the general area* which they now serve." Again the Report states, "*within the general area* receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors." Also, "the House bill would invite litigation anytime that a distributor of TVA power undertook service to a new customer, even *within the general area* it was already serving."

The only other place in the statute where the term "general area" appears is the provision

"Nothing in this Chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same *general area* where TVA power is supplied to obtain TVA power."

This provision was placed in the Act by amendment on the floor of the House for the stated purpose of preserving the rights of two towns in Mississippi to obtain TVA power, as they were reported to be presently engaged in litigation seeking such power.¹⁰⁰ The two towns, Coldwater and Olive Branch, then served by other utilities, were in an area completely surrounded by the service area of TVA distributors.

The attention of Congress was thus directed to the problem of isolated areas not served by TVA but surrounded by such service and Congress solved the problem by permitting TVA service only to new customers in such isolated

¹⁰⁰ 105 Cong. Rec. 7703 (May 7, 1959).

areas not receiving service from another source on the effective date of the Act.

Conversely, a reading of the legislative history demonstrates that the attention of Congress was at no time directed to any problem concerning isolated areas of TVA service somewhere beyond its primary service area and the five-miles adjacent thereto. TVA has admitted, and in fact strenuously argued, that the primary service area of TVA and its distributors is that geographic area of some 80,000 square miles where TVA power was being distributed in 1957. It is acknowledged by TVA that its "primary area" includes *all* of that geographic area where TVA distributors were supplying power in 1957. Neither in testimony before the committees of Congress nor in the evidence in this case is there any mention of any area outside of the approximately 80,000 square mile primary area of TVA service where there are any customers or facilities of TVA distributors. There may be such areas but there is no indication that Congress was ever apprised of that fact.

Congress was necessarily dealing with the problem at hand, islands of private power service surrounded by TVA service, and not some area outside the 80,000 square mile TVA area to which its attention was never directed and where TVA distributors had no "established" electric service at all.

4. *The exception as to specifically named cities and customers.*

The 1959 TVA Act contains, in addition to the provisions discussed above, an express exception permitting TVA service to twelve named cities in Tennessee, Kentucky and

Georgia. Of those twelve excepted cities eight—Dyersburg, Covington, Oak Ridge and South Fulton, Tennessee; Fulton and Hickman, Kentucky; and Chickamauga and Ringgold, Georgia—are completely surrounded by the service area of TVA distributors.

The petitioners contend that, even though no exception was made in the Act for the Tazewells, TVA service can be rendered to the towns because they are somehow inside the “periphery” of the TVA service area. If this contention were correct, there would be absolutely no need for the statute to expressly except any one of the eight named cities which are *in fact* surrounded by TVA service.

The net effect of petitioners’ arguments is to ask this Court to substitute the Senate Committee version of the Bill, rejected by Congress, for the language of the Act as passed.

Thus, in the Brief for the Cities (p. 17), reference is made to the statement in the Senate Committee Report that the Committee Bill would “protect the right of certain communities to choose their power supply.” Again, it is stated in the Brief for the Cities (p. 35) that the Senate Committee left the language of the Act “to some degree imprecise” because it believed it “desirable to authorize minor adjustments.” A similar argument is made at page 22 of the Brief for the Cities where the language of the Committee Report is contrasted with the views of Senators Prouty and Randolph and these Senators are even described as “*opponents* of the final language of the bill.” Senator Randolph was, of course, the *author*, rather than an opponent, of the final language.

Further, reference is made to a statement of Senator Cooper as supporting the interpretation placed upon the Act by petitioners (see Brief for Cities, p. 17). Senator Cooper was the author of the Senate Committee version, subsequently rejected by the Senate.¹⁰¹ On the floor of the Senate he moved to strike the Randolph amendment in favor of the Senate Committee version. Speaking in support of the Senate Committee version, and against the Randolph amendment, he did make the statement quoted at page 17 of the Cities' Brief. He also made the following statements with respect to the Randolph Amendment:

"I wish to note that in doing this I believe we have gone too far. One purpose of *my* amendment, permitting an *extension* of the service area, was to permit necessary adjustments between private utilities and TVA. Now, the *fixed area* provided by the amendment of the Senators from Georgia and West Virginia will mean that every time there is some little problem between a private utility and the TVA, the agency will be required to come to Congress to have it settled. The amendment which I offered would have permitted such adjustments between TVA and private utilities.

"I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.

"And it says to the *small communities on the perimeter*, 'You can never choose to secure power from TVA, even though your city councils and your people desire it.'"¹⁰²

¹⁰¹ 105 Cong. Rec. 13052 (July 9, 1959).

¹⁰² Id at p. 13052-53.

Having lost the battle in Congress petitioners now seek redress here.

B. The Subsequent Legislative History.

The intent of Congress to fix a boundary around the TVA service area as it existed in 1957 and to prohibit TVA service ~~to municipalities~~ which were outside that area is again clearly demonstrated in the subsequent history of the Act.

In 1966, the TVA Act was amended to increase the amount of bonds which might be issued by TVA from \$750,000,000 to \$1,750,000,000.¹⁰³ In the course of this legislation representatives from Jackson Purchase Rural Electric Cooperative Corporation sought to have the Act amended to specifically accept Jackson Purchase from the territorial limitation provisions. A hearing was held before the Senate Committee on Public Works on July 22, 1966, and excerpts from this hearing were subsequently introduced into the Congressional record.¹⁰⁴ In the course of these hearings representatives from Jackson Purchase variously described the Jackson Purchase service area as being an "enclave" surrounded by the TVA area,¹⁰⁵ an "underdeveloped island,"¹⁰⁶ a "pocket of discrimination in the TVA area,"¹⁰⁷ and noted that "A TVA customer may be located on one side of the street and Jackson Purchase customers are located across the street and in many instances even next door to each other."¹⁰⁸ Reference was also made to the fact that Jackson Purchase was a preferred customer under the

¹⁰³ PL 89-537, 80 Stat. 346 (1966).

¹⁰⁴ 112 Cong. Rec. 16479 (Daily ed. July 27, 1966).

¹⁰⁵ Id at p. 16479.

¹⁰⁶ Id at p. 16480.

¹⁰⁷ Id at p. 16481.

¹⁰⁸ Id at p. 16479.

TVA Act and that the rate differential between TVA power and Jackson Purchase's present supplier was affecting the economy of the area.¹⁰⁹ Finally, for the above reasons it was suggested that an amendment excepting Jackson Purchase from the area limitation provisions would not change the Act but merely clarify what Congress originally intended.¹¹⁰

The Senate Committee, after noting the arguments of Jackson Purchase stated:

"The committee feels that no matter how many changes are made in the territorial boundaries restricting the sale of TVA power, there will always be someone who is located on the periphery of the service area and denied service by the Tennessee Valley Authority. Thus, to change the boundaries to provide service for one area would merely create a similar situation elsewhere.

.

"Therefore, while the committee sympathizes with Jackson Purchase and others who desire to purchase TVA power, it feels that any change in the present authorized service area of TVA would only result in a contentious situation seriously handicapping the efforts of the Tennessee Valley Authority to operate in harmony with neighboring privately owned utilities."¹¹¹

On the floor of the Senate during debate on the Bill, Senator Randolph reiterated the views of the Committee, as follows:

¹⁰⁹ Id at p. 16482.

¹¹⁰ Id at p. 16481.

¹¹¹ S: Rep. No. 1399, 89th Cong., 2nd Sess., p. 3-4 (July 22, 1966), 2 U. S. Code Cong. & Ad. News, 89th Cong., 2nd Sess., p. 2628-29 (1966).

"The committee, while sympathetic to the request of Jackson Purchase, considered it unwise to expand the territorial limits of TVA imposed by the 1959 act.

"As the Members of this body know, the Congress, after long and careful deliberation, established a territorial limitation in the act of 1959 on the service area of the Tennessee Valley Authority. The area thus established was defined as that for which TVA was the primary source of power on July 1, 1959, plus certain exceptions as set forth in the act.

"The expansion of TVA beyond its present *service area* is of great concern to the investor-owned utilities. Since the establishment of the territorial boundary in 1959, these companies have been free to develop their existing facilities and service area needs¹¹² without fear of losing their customers through further expansion of TVA beyond those 1959 boundary delineations.

"If Congress were to permit the expansion of TVA at this time to provide service to Jackson Purchase, it would open a Pandora's box. We would be beset by requests from others on the periphery of the service area for similar treatment. This would only serve to disrupt and destroy the amiable relations between the Government-owned Tennessee Valley Authority and the private power companies that have existed since establishment of the territorial limitation in 1959."¹¹³

The arguments and considerations set forth in Point I of the Brief for the Cities for including the Tazewells

¹¹² For example, in 1963 KU invested a substantial sum to rebuild its transmission line to Tazewell from 34.5 KV to 69 KV, which investment would be worthless to KU if Powell Valley were now permitted to serve the Tazewells (R. 444, 439).

¹¹³ 112 Cong. Rec. 16477 (Daily ed. July 27, 1966).

within the TVA area are the same arguments and considerations unsuccessfully urged upon Congress by Jackson Purchase.¹¹⁴ It could not be clearer from the wording of the Act, and the legislative history, including subsequent legislative history, that Congress did, in fact, intend to prohibit TVA distributors from supplying power to municipalities adjacent to the border of the TVA service area, and thereby to maintain the status quo as of 1957.

C. The basis for the Court of Appeals determination on the merits.

The Court of Appeals decision is based upon the undisputed facts as to the geographical boundary between the area served by KU in Claiborne County and the area served by Powell Valley. The facts as to the location of the boundary have been previously summarized in the Statement portion of this Brief.

On July 1, 1957, KU served 95.3% of the customers and delivered 94.1% of the energy consumed in the Tazewells and served more than one-third of the customers and supplied more than one-third of the energy in the whole county. The area in which this energy was supplied by KU is a corridor or peninsula extending from the border of Bell County, Kentucky, south and east for a distance of

¹¹⁴ Although petitioners have also complained that KU is "skimming off the cream" of the power business in Claiborne County by serving the heavily populated areas, as opposed to the rural area, Congress recognized that the continued financial soundness of public utilities was dependent upon its municipal business. We doubt if petitioners would question the fact that the REA program was designed for the purpose of subsidizing electric service to rural areas which could not feasibly be served by private investment. As the purpose of the REA loans to Powell Valley and other cooperatives is to provide rural service, we do not understand that they are now complaining of the necessity of performing this function.

some 15 miles to and including the Tazewells. KU is the sole source of power supply in Bell County, Kentucky, and its service area in Clairborne County, Tennessee is no more than a continuance of and part of the overall KU service area which extends up into Bell County and other areas throughout Kentucky.

Beginning in the Cumberland Gap area of Clairborne County adjacent to the Kentucky border, KU lines and customers extend uninterruptedly through the corridor to the Tazewells and on into the area southwest of New Tazewell. Within this corridor KU maintains a transmission line and approximately 90 to 100 miles of distribution lines¹¹⁵ serving some 1,278 customers, in addition to the 561 customers served inside the towns. It is not claimed that there is any place within the 15-mile corridor or peninsula of KU service extending from the Kentucky border to the Tazewells where the lines and customers of KU are anywhere cut off or interrupted by a service area or customers of Powell Valley. In fact, only one line of Powell Valley crosses this KU corridor in the entire distance between the Kentucky border and Tazewell, and at the very point of crossing KU has a cluster of four customers.¹¹⁶

TVA and Powell Valley have in the past recognized this area of KU service both by territorial agreements and by numerous maps in evidence prepared by TVA which show the existence of this corridor contiguous to the rest of the KU service area in Kentucky.¹¹⁷

¹¹⁵ R. 407.

¹¹⁶ Supra, note 92.

¹¹⁷ Supra, note 19.

Two maps in particular were prepared for the express purpose of delineating the KU service area. The first of these maps was prepared by TVA in 1953 for the express purpose of showing "the area now served by LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee."¹¹⁸

The second of these maps, the so-called Rowe-Osborne map,¹¹⁹ was prepared in 1960, after the passage of the Act, for the express purpose of defining an exact boundary between the respective service areas. The accuracy of this map, its acceptance by the manager of Powell Valley and KU's manager in the area, and its subsequent use by them to resolve service area questions has not been disputed. This map alone is a complete answer to any contention that KU does not have a definite service area in Claiborne County or that no border can be established between the KU and Powell Valley service areas.¹²⁰

TVA and Powell Valley do not deny: (1) the authenticity of maps prepared by them to show the KU service area in Claiborne County; (2) the accuracy of the Rowe-

¹¹⁸ Ex. 36—R. 402, 769; R. 400.

¹¹⁹ Supra, note 16.

¹²⁰ The Rowe-Osborne map is reproduced in two sections at R. 807-808 and somewhat more clearly at R. 973 (top half) and at Exhibit Vol. I, Sheet 4b (bottom half). It should be explained that this map was prepared to define the KU-Powell Valley boundary only and was not prepared to define the boundary between the KU service and the city of LaFollette's system to the west. Therefore, the eastern and southern boundary lines of the shaded KU area on the map represent the boundary between KU and Powell Valley. The wavy line on the west side of the shaded area with cross-hatch marks simply shows that LaFollette's service area is generally to the west of the KU area in that part of the county. The wavy line does not represent the boundary between KU and LaFollette and, in fact, the boundary is considerably to the west of the line in most instances.

Osborne map in defining the boundary between Powell Valley and KU; (3) the accuracy of the many exhibits showing the exact location of the respective customers and facilities of KU and Powell Valley; (4) the authenticity of 10 other maps published and distributed by TVA showing the KU corridor of service extending from Cumberland Gap to Tazewell; or (5) the fact that KU is rendering electric service all up and down its entire service area from the Kentucky border at Cumberland Gap, without interruption, to the Tazewells.

What, then, are the arguments which Petitioners advance for attacking the decision of the Court of Appeals on the merits of this case?

D. The basis of the TVA Board's determination.

On August 26, 1964—about three weeks before the trial of this action in the District Court, the TVA Board of Directors adopted the following resolution which Petitioners now contend is determinative of the merits of this case:¹²¹

“Now, Therefore, Be It Resolved, That the Board of Directors hereby finds and determines that *all of Claiborne County, Tennessee*, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957;

“Further Resolved, That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia, and Kentucky and running first south and then west *along the line separating Tennessee and Kentucky* to the line dividing Claiborne and Campbell Counties, Tennessee, is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on

¹²¹ Ex. 93—R. 553, 796.

July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee."

As a statement of fact the resolution is simply incorrect.

As the basis for its resolution the TVA Board considered (1) a memorandum of G. O. Wessenauer,¹²² TVA's manager of power, and (2) a memorandum from TVA's general counsel,¹²³ both dated August 25, 1964, the day before the resolution was adopted.

Mr. Wessenauer's memorandum first refers to a map of the lines and customers of the TVA distributors in Claiborne County.¹²⁴ No maps showing the location of KU's customers and facilities were supplied to the Board, notwithstanding the fact that the maps were available through discovery proceedings in this action. With reference to the map presented to the Board Mr. Wassenauer stated:

"It will be seen that the lines of TVA distributors blanket Claiborne County *except* for the mountainous area, between the extreme northwestern part of the county served by LaFollette and Cumberland Mt. (which is without electric service except for a few customers served by Kentucky Utilities off a line running down Mingo Hollow) and a *small area near the point where Kentucky, Tennessee, and Virginia come together embracing Cumberland Gap, Harrogate, and Shawanee. Kentucky Utilities provides service to most of the consumers in Tazewell and New Tazewell, for a group of consumers near Arthur, and to scattered rural consumers, most of whom are in the area immediately south of Powell River.*"

¹²² Ex. 93 (8-26-64a)—R. 553, 800.

¹²³ Ex. 93 (8-26-64b)—R. 553, 804.

¹²⁴ Ex. 91—R. 552, Ex. Vol. I Sheet 1b.

Thus, Mr. Wassenauer himself acknowledged that the lines of the TVA distributors blanketed the county *except* for the very area in question here—the area from the Kentucky border at Cumberland Gap south and east through Harrogate, Shawanee, Arthur and on south of the Powell River to and including Tazewell and New Tazewell.

Mr. Wessenauer then recited the statistics concerning service by KU and the TVA distributors in Claiborne County as a whole, compiled from answers to interrogatories in this action, but made no mention of the statistics similarly compiled as to service in the Tazewells.

He then made reference to certain maps attached to his memorandum which had been exhibited by TVA at several of the congressional committee hearings during the consideration of the TVA bond legislation from 1955 through 1959.¹²⁵ With respect to these maps the memorandum states:

“The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA.”

Finally, the memorandum refers to a map which Kentucky Utilities furnished to the House Committee on Public Works in connection with hearings on the 1959 TVA Act. Mr. Wessenauer notes in the memorandum that this map shows all of Claiborne County in the TVA service

¹²⁵ Ex. 93 (8-26-64a)—R. 553, Ex. Vol. I Sheets 5b, 6b, 7b.

area, except for a small portion west of Cumberland Gap.¹²⁶ This map was filed in connection with the statement of Mr. R. M. Watt, Board Chairman of KU, at the hearings before the House Committee on Public Works. As previously noted,¹²⁷ Mr. Watt and other utility executives appeared at these hearings to protest against the original House version of the Act which would have permitted TVA service in the whole of any county partly served by TVA (i.e., Claiborne County) and as a result of such protests this version of the Bill was dropped in favor of the Vinson Amendment. The map referred to by Mr. Wessenauer was one of *two* maps presented by Mr. Watt in connection with his prepared statement delivered to the Committee for the sole purpose of opposing a bill which would have permitted TVA distributors to take KU's customers in Claiborne County, Tennessee. Both of the maps were supplied to TVA in answers to interrogatories in this action but only the first map was attached to Mr. Wessenauer's memorandum and presented to the Board. The reason for this is obvious. The second map¹²⁸ was designed for the express purpose of showing the existence of KU's service in Claiborne County and is the map to which Mr. Watt referred in his testimony as showing "one county in Tennessee in which the company renders service."¹²⁹ When questioned at the trial as to the reason why the second map was not also furnished to the Board, Mr. Wessenauer was forced to admit that he was not aware of its existence, even though both of these maps, together with the attached statement of Mr. Watt explaining the purpose of the maps,

¹²⁶ Ex. 92 (8-26-64a)—R. 553, Ex. Vol. I Sheet 8b.

¹²⁷ See p. 49, *supra*

¹²⁸ Ex. 100 (8-26-64a)—R. 553, Ex. Vol. I Sheet 9b.

¹²⁹ *Supra*, note 78.

had come into the possession of TVA in the course of this action.¹³⁰

In addition to Mr. Wessenauer's memorandum, the TVA Board of Directors was furnished with a memorandum of its general counsel. This memorandum stated:

"From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) *with the possible exception of the area around Cumberland Gap*, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. *A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap.* This is a matter for the Board to decide. It is my view that, *considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area*, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell counties."

Based upon the above memoranda the Board made its determination that all of Claiborne County was within

¹³⁰ R. 585-588.

the area for which TVA was the primary source of power supply.

In these memoranda three basic reasons are set forth for the inclusion of the whole of the county within the TVA service area: (1) TVA distributors served most of the county; (2) certain maps exhibited to Congressional Committees by TVA witnesses showed all of the county within the TVA area; and (3) the KU service area was "relatively small."

With respect to the first of these contentions, the fact that TVA distributors supplied approximately two-thirds of the electric energy consumed in the county and its lines "blanketed" all of the county *except* for the KU service area from the Kentucky border south to the Tazewells, cannot, as a matter of law, form the basis for a conclusion that the whole of the county was in the TVA area. Congress considered and rejected a bill which would have provided that TVA could serve the whole or any county which was partially served by TVA in 1957, in favor of the present Act restricting TVA service to the area for which it was the primary source of power supply, irrespective of county boundaries. The Bill was so amended because of objections of utility company witnesses at the hearings, which witnesses included Mr. Watt of KU, who specifically objected to the possible effect which the language would have on KU's service area in Claiborne County.

With respect to the maps exhibited by TVA witnesses at Congressional hearings, it is obvious that Congress did not intend that the TVA service area should be conclusively presumed to be the area shown on some of the maps exhibited in the course of some Congressional hearings.

The Court of Appeals properly rejected this contention (375 F.2d at p. 412) and we would not be disposed to argue this point further, except for the fact that the maps apparently formed the basis for the District Court's opinion in this action.

The District Court, after referring to the determination of the TVA Board of Directors, concludes:

"At the time of the determination, the Directors had before them the four maps that were submitted to the Congress by the witnesses for TVA.

"The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

"The finding of the Board was made in good faith and supported by substantial evidence.

"The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957." (237 F. Supp. at p. 514)

In view of this language in the District Court opinion we feel it is necessary to make at least some comment on these maps. All of these maps¹³¹ are large scale maps of the southeastern United States which were admittedly

¹³¹ Supra, note 125.

"rough approximations"¹³² and not "offered as accurate representations of service area."¹³³ In fact, the maps differ from each other in substantial respects in depicting TVA's service area. The TVA Board was so advised in Mr. Wessenauer's memorandum to the Board.

A determination that Congress intended to define the TVA service area by reference to certain large scale, inaccurate and inconsistent maps which the majority of the members undoubtedly never saw borders on the frivolous.

Finally, there is the conclusion reached by TVA's general counsel in his memorandum to the Board that because the KU service area in the vicinity of Cumberland Gap was "relatively small" the Board could properly "resolve this question by finding that all of Claiborne County" was within the TVA service area. If this logic be accepted, TVA distributors could extend their service to any adjacent area of private utilities' service regardless of the five-mile and other limitations in the Act. The whole purpose of the territorial limitation provisions would be quickly undermined if TVA were permitted to arbitrarily include within its service area any adjacent "relatively small" areas served by other utilities.

In view of the fact that TVA expressed doubts as to whether its primary service area should include the area around Cumberland Gap served exclusively by KU, one is prompted to ask why the TVA Board did not fix the periphery of its service area just south of Cumberland Gap. On closer examination the reason becomes obvious. If the TVA Board were to concede that *factually* Cumberland

¹³² R. 583.

¹³³ R. 570, 292.

Gap were a part of KU's service area there would be no other place, consistent with such fact, to fix the periphery unless it were south of the Tazewells, at the actual border of the KU-Powell Valley service areas.

Cumberland Gap is a community adjacent to the Kentucky-Tennessee border. Bell County, Kentucky, across the border, is served exclusively by KU as is Cumberland Gap on the Tennessee side. There are no facilities of any TVA distributor anywhere near Cumberland Gap. The service area, facilities and customers of KU are continuous, uninterrupted and unbroken from Cumberland Gap at the state line down to and including Tazewell and New Tazewell. If TVA were to concede that its periphery should dip down to exclude from its area Cumberland Gap, or any part of KU's service area in the county, then there would be no place where TVA could factually establish the location of its periphery so as to include the Tazewells within the TVA service area. Anywhere the TVA Board might select, between Cumberland Gap and Tazewell, to fix the boundary of its area, there would be KU service on *both sides* of the line.

For these reasons TVA is forced to select the Kentucky-Tennessee line at Cumberland Gap—despite the fact that the area on both sides of this line is served exclusively by KU—and then attempt to support such location of its periphery by resorting to arguments with respect to maps used before Congressional Committees, to the county-wide approach specifically rejected by Congress, and the meaningless assertion that KU's service area is a "relatively small" area.

The Court of Appeals properly considered and rejected each of these untenable and "unreasonable" arguments.

III.

In rejecting the determination of the TVA Board in this action the Court of Appeals properly exercised its function of judicial review.

Petitioners contend that the interpretation placed upon the Act by the TVA Board of Directors was a "reasonable" one, and the Court of Appeals therefore erred in not "deferring to" or accepting the Board's conclusions.¹³⁴ In fact, the Court of Appeals considered each of the factors upon which the Board based its conclusion and properly rejected them as having no support in the language or history of the Act and thus, necessarily, "unreasonable." The real issue is simply whether the Court of Appeals should have accepted the Board's interpretation of the statute even though the Court's interpretation, based upon the language of the Act and its intent as disclosed by the legislative history, compelled a contrary conclusion. The

¹³⁴ TVA apparently concedes that the Board's determination constituted a conclusion of law, a matter of statutory interpretation (See Brief for TVA, pp. 22-29). The Cities, however, do imply that the conclusions of the Board were findings of fact which should be upheld if supported by "substantial evidence" (See Brief for Cities, pp. 41-45). There is no finding of fact in dispute in this case and the sole question is the proper interpretation of the Act in light of the admitted and undisputed facts. In any event, the "substantial evidence" rule applies to "substantial evidence on the record as a whole" in quasi-legislative or quasi-judicial proceedings before administrative agencies. See 5 USC § 1009(e). The several cases cited in the Brief for the Cities in support of the substantial evidence doctrine are therefore not in point, e. g., *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, *Illinois Central R. R. v. Norfolk & Western Ry.*, 385 U.S. 57, 17 L. ed 2d 162; *Corn Products Refining Co. v. FTC*, 324 U.S. 726; *United States v. Utah Construction & Mining Co.*, 384 U.S. 394.

answer to this question was clearly stated by this Court in *NLRB v. Brown*, 380 U. S. 278, 291:

“Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.”

The question of the scope of judicial review of administrative action is admittedly a perplexing one and not susceptible to the application of precise verbal formula, there being “no talismanic words that can avoid the process of judgment.” *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 489. A comparison of certain of the cases cited in petitioners’ Briefs with other decisions of this Court illustrates clearly the inapplicability of any hard and fast rules in the determination of the proper scope of review.

For example, in *NLRB v. Hearst Publications*, 322 U. S. 111, the Court reversed a judgment of the Court of Appeals which had set aside a determination of the Board that newsboys were “employees” within the meaning of the National Labor Relations Act, stating that the determination of the Board had “reasonable basis in law.” Conversely, in *NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322, a reversal by the Court of Appeals of a Board determination that the CIO was not a “national or international labor organization” within the meaning of the Labor Management Relations Act, was affirmed, despite the contention of the Board that its interpretation of the act was “reason-

able" and should be sustained under the doctrine of *Hearst Publications*.¹³⁵

Again, in *Gray v. Powell*, 314 U. S. 402, the Court sustained the determination of the Director of the Bituminous Coal Division, reversed on appeal, that a railroad was a "producer" of coal. But subsequently in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, the Court rejected a finding of the Price Administrator, affirmed by the Emergency Court of Appeals, that a warehouse was not a "public utility" within the meaning of the price control laws, stating:

"If Congress had deemed it necessary or even appropriate "at the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should outweigh the considerations we have set forth as to the proper construction of the statute." (321 U. S. at p. 156)

The Court, on occasion, has in the same case deferred to an agency determination on some issues while reaching its own conclusions on others, independent of the agency determination¹³⁶ or contrary to it.¹³⁷ And the number of

¹³⁵ Compare *United States v. Drum*, 368 U. S. 370, with *ICC v. J-T Transport Co.*, 368 U. S. 81, and *Schaffer Transportation Co. v. United States*, 355 U. S. 83.

¹³⁶ See *Unemployment Compensation Comm'n v. Aragon*, 329 U. S. 143.

¹³⁷ See *NLRB v. Coca-Cola Bottling Co.*, 350 U. S. 264.

dissenting opinions in the above cited cases and others cited in the petitioners' Briefs on this point, attests to the difficulty of formulating any precise rules of law on the question and the consequent necessity of deciding each case on its own particular facts and circumstances.

It nevertheless appears from the welter of decided cases that there are certain underlying factors or considerations which influence the extent to which the courts will defer to administrative interpretations of law. If the determination is made in furtherance of a broad scheme of administrative regulation entrusted by Congress to the agency; or if administrative "expertise" is required to properly determine the question; and if the agency's interpretation of the law accords with the general statutory purposes, is directed to achieving the results intended by Congress, a degree of judicial deference may be appropriate. On the other hand, where such factors or considerations are not present, as in the instant case, and where the question is whether the agency has acted contrary to express statutory limitations on its powers, it is the function of the judiciary to determine if the agency has acted unlawfully.

This Court has permitted the broadest discretion to those agencies who are charged by Congress with the responsibility of administering federal regulatory statutes, and required to act thereunder as rule making bodies or administrative tribunals in the regulation of private individuals and businesses. Most of the cases cited in the petitioners' Briefs on this question involve such agencies and concern appeals from formal proceedings before administrative

tribunals.¹³⁸ On the other hand, determinations not made in such adversary proceedings "are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions" *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, 290.

Here, of course, TVA is not charged with the responsibility of regulating the business of public utilities operating in areas adjacent to the TVA service area. On the contrary, the 1959 TVA Act simply prohibits TVA from expanding its geographic service area and thereby encroaching upon the adjacent areas being served by other utilities. As pointed out by the Court of Appeals (375 F. 2d at p. 415), Congress did not, under the act, delegate to the TVA Board of Directors any policy making duties with respect to this limitation on its activities.

The determination of the TVA Board in this case that it was not acting contrary to statutory restrictions on its own electric service cannot be equated with policy making decisions of regulatory agencies acting under a broad mandate from Congress.¹³⁹ This case does not even concern the

¹³⁸ See, e.g., *Gray v. Powell*, 314 U. S. 402, 411, where the court stated:

"In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4-II(I) and 4-A, the function of review placed upon the courts by § 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."

¹³⁹ For example, petitioners seek to compare the determination of the Board in this case with a determination by the SEC that there was no "loss of substantial economies" within the meaning of the Public Utility Holding Company Act, 15 USC § 79k(b)(1)(A),

propriety of TVA's activities under the mandate of the original TVA Act,¹⁴⁰ but the construction of a statute which spells out in considerable detail the permissible geographic limits of TVA's power service. As seen previously the term "area" in the statute, which petitioners contend is too broad a term to permit of application without resort to administrative construction, was clearly intended by Congress to refer to the geographic area where the customers and lines of the TVA distributors were physically located on July 1, 1957. Thus, Senator Randolph stated:

"Mr. President, I know it is the clear intent of the Senate Committee on Public Works—as it must have been the intent of the House—to indicate clearly that authority is not to be given TVA, by *general language*, to engage in expansion other than that occasioned by the normal growth of TVA's *existing territory*."¹⁴¹

It is obvious that Congress intended to place clearly defined limitations on the expansion of TVA power service, and the mere fact that TVA must initially determine whether it is acting lawfully in contracting for the sale of electric power in a given area does not mean that the courts are required to defer to such initial determination. For, indeed,

"Every statute to some extent requires construction by the public officer whose duties may be defined

SEC v. New England Electric System, 384 U. S. 176; or whether products were of "like grade and quality" within the meaning of the Robinson-Patman Act, 15 USC § 13(a), *FTC v. Borden Co.*, 383 U. S. 637; or whether activities constitute "unfair methods of competition" under § 5 of the Federal Trade Commission Act, 15 USC § 45(a), *FTC v. Brown Shoe Co.*, 384 U. S. 316.

¹⁴⁰ The original act authorized TVA to sell and distribute electric power "equitably among the states, counties, and municipalities within transmission distance." 16 USC § 831j.

¹⁴¹ 105 Cong. Rec. 13060 (July 9, 1959).

therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform." *Roberts v. United States*, ex. rel. *Valentine*, 176 U. S. 221, 231.

If the initial determination by the TVA Board as to the meaning of the statutory prohibition on expansion of its service area was wrong, it was the duty of the Court of Appeals to so hold.

Another related factor considered by this Court in determining the permissible scope of judicial review of administrative action is the degree of administrative expertise which may be required to properly apply statutory language to a given case. Petitioners suggest that "determining the *appropriate* area in which to confine distribution by a vast power complex" requires the application of a high degree of expertise on the part of the TVA Board of Directors, armed with "familiarity with local conditions in the Tennessee Valley region and by knowledge and experience of the economics and technology of the electric power industry."¹⁴² The answer to this contention is surely that Congress determined the "appropriate area" in which TVA was to confine its electric power distribution by the enactment of the 1959 TVA Act. Familiarity with local conditions in the Tennessee Valley and economic and technological experience in the electric power industry cannot form the basis for a determination of the geographic area in which TVA service was being supplied in 1957. As stated by the Court of Appeals in this case:

¹⁴² See Brief for TVA, p. 28.

"Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board." (375 F.2d at p. 415)

In seeking to magnify the role of expertise in construing the act, TVA poses the following questions in its Brief (p. 26):

"On the relevant date, TVA supplied more than half of the total electric power consumed in the State of Kentucky. Is all of Kentucky, therefore, within the TVA primary area? Or should the area be determined, rather, on a county-by-county, or even a municipality-by-municipality, basis? Must political subdivisions be used at all, or should the primary area be delineated in accordance with historic marketing patterns in the electric industry? May still other factors be relevant?"

It does not attempt to supply the answers to the posed questions, although the answers are quite evident. The boundaries of states, counties and municipal subdivisions are obviously not relevant factors. Congress expressly rejected a version of the statute which would have been based on political boundaries after it was pointed out that this would result in the possibility of considerable expansion of TVA's existing service area. With respect to "historic marketing patterns in the electric industry," Congress specifically selected one "historic pattern," the geographic area where the TVA customers were located on July 1, 1957. This is the only relevant factor.

In any event, as shown previously, the determination of the TVA Board in this case was not based upon reasons of economics, technology or "historic marketing patterns,"

but upon the fact that TVA served most of Claiborne County on July 1, 1957, and had on occasion exhibited maps to Congressional Committees considering the TVA bill, incorrectly showing the approximate area of TVA service to include all of Claiborne County. Neither here nor in the lower courts have petitioners pointed to any economic or technical factors as being determinative and the correctness of the Board's determination must be judged "solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U. S. 194, 196; *Burlington Truck Lines v. United States*, 371 U. S. 156.

The controlling facts, the location of the customers and lines of the TVA distributors and the customers and lines of KU in Claiborne County on July 1, 1957, were never in dispute and after the passage of the Act representatives of KU and Powell Valley, working together, prepared a map accurately defining the boundaries of their respective service areas. Under these circumstances the application of the Act to the given facts was not a matter for administrative expertise to which the Court of Appeals should defer. Rather, it was the function of the Court, in the normal exercise of its judicial duties, to interpret the statute in light of the undisputed facts.

The primary, overriding factor in determining what deference, if any, the courts should give to an administrative interpretation of a statute is whether or not the agency's determination is consistent with the purposes of the Act. As an initial premise, a statute "must be read in the light of the mischief to be corrected and the end to be attained." *NLRB v. Hearst Publications*, 322 U. S. 111, 124. See *ICC v. J-T Transport Co.*, 368 U. S. 81, 107, 127-28 (concurring opinion of Frankfurter, J.). In this

regard it must be significant that the petitioners, in asserting the reasonableness and therefore finality of the TVA Board's determination, do not once allude to the purpose of the territorial limitation provisos. Surely, the "mischiefs" to be corrected is the taking of existing customers of public utilities by distributors of TVA power, and the "end to be attained" is the prevention of destructive competition by TVA distributors with adjacent utilities. The determination of the TVA Board in this case is utterly inconsistent with both the letter and the purpose of the Act.

Finally, this Court has been historically most reluctant to defer to agency determinations when the issue is whether the agency has exceeded its statutory authority or acted contrary to a statutory prohibition against agency action. Thus, in *Peters v. Hobby*, 349 U. S. 331, the Court struck down a finding of the Loyalty Review Board of the Civil Service Commission, made after a hearing conducted by the Board on its own initiative. The Executive Order establishing the Board authorized such hearings only on petition of the employee in question or his employing agency. In upholding the right of the employee to challenge the action of the Board in a declaratory judgment action, the Court stated:

"Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority."
(349 U. S. at p. 345)

Again, in *Leedom v. Kyne*, 358 U. S. 184, the National Labor Relations Board included both professional and non-professional employees in a collective bargaining unit, without first taking a vote among the professional employ-

ees, contrary to the provisions of Section 9 of the National Labor Relations Act (29 USC § 159(b)) which Section expressly provided that the Board should not designate such a unit unless a majority of the professional employees voted for inclusion. The Board contended that its action could not be challenged in an original suit, review of its action being limited to the review procedures provided in the Act. In rejecting this contention the Court stated:

"This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U. S. at p. 188).

In the case at bar the question is whether TVA, in contracting for the sale of electric power in an area heretofore served exclusively by KU, was acting contrary to an express statutory prohibition. Under such circumstances "an agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U. S. 358, 369.

Conclusion

For the reasons set forth above, the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SQUIRE R. OGDEN
MALCOLM Y. MARSHALL
JAMES S. WELCH
OGDEN, ROBERTSON & MARSHALL
610 Marion E. Taylor Building
Louisville, Kentucky—40202

APPENDIX

APPENDIX

ATTENTION

Conclusion

Respectfully,
[Signature]
[Name]
[Title]
[Address]
[City, State, Zip]

APPENDIX

H. R. 3460 as introduced in the House of Representatives on January 27, 1959:

"It is hereby declared to be the intent of this Act that the power facilities built or acquired with the proceeds of such bonds or power revenues shall not be used, without prior approval by Act of Congress, for the sale or delivery of power by the Corporation outside the counties which lie in whole or in part within the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957, except, when economically feasible, to serve the United States or agencies thereof or to interconnect with other utility systems for exchange power arrangements, or to interconnect Tennessee Valley Authority generating plants, or to serve existing rural electric cooperatives (as same now exist as to area and as of July 1, 1957) now being served in part by the Tennessee Valley Authority: Provided, further, That except as expressly provided above, all contracts entered into after this provision becomes law for the supply of power to any distributor shall contain an agreement by said distributor to confine the resale of such power within the boundaries of the counties above described and such additional areas (not more than five miles from such boundaries) as may be necessary to care for the growth of communities within said counties provided said communities were receiving Tennessee Valley Authority power on July 1, 1957."

H. R. 3460 as reported out of the House Committee on Public Works with the Vinson amendment, April 14, 1959:

"Unless otherwise specifically authorized by Act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be

used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except when economically feasible for exchange power arrangements with other utility systems with which the Corporation had such arrangements on said date. Nothing herein contained shall prevent the Corporation from continuing service to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; and South Fulton, Tennessee; or agencies thereof: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as reported out of the Senate Committee on Public Works on July 2, 1959:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale of power (except with such States, counties, municipalities, corporations, partnerships, or individuals with which the Corporation had such contracts on July 1, 1957) which would make the Corporation a source of power supply for any city which owned its power distribution system on July 1, 1957, having a population in excess of ten thousand, or to any other city having a population in excess of five thousand, according to the latest Federal census, or which would in any event, increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser, no part of which may be in a State not now served by the Corporation, nor more than five hundred square miles of which may be in any one State now served by the

Corporation or its customers), the area for which the Corporation was the primary source of power supply on July 1, 1957; Provided, however, That in addition to the extension of the service area authorized in this subsection, nothing herein contained shall prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association, and for the rural customers in the areas now served by the said East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as finally enacted with the Randolph amendment:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be

necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than $2\frac{1}{2}$ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State not now served by the Corporation or its distributors.

“Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

“Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; *Hickman, Kentucky*; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauder-

dale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association [and for the rural customers in the areas now served by the said East Mississippi Electric Power Association] Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area, where TVA power is supplied to obtain TVA power." (Additions to the Randolph amendment shown in italics, deletions shown in brackets.)